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RULEMAKING PROCEDURES REFORM ACT OF 1985

HEARING

BEFORE THE

SUBCOMMITTEE ON
ADMINISTRATIVE PRACTICE AND PROCEDURE

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-NINTH CONGRESS

FIRST SESSION

ON

S. 1145

A BILL TO INCREASE THE ACCOUNTABILITY OF, POLICY COORDINATION BY, AND MANAGEMENT OF PRIORITIES BY AGENCIES THROUGH AN IMPROVED MECHANISM FOR CONGRESSIONAL OVERSIGHT OF THE RULES OF AGENCIES

JULY 9, 1985

Serial J-99-38

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE
51-656 O WASHINGTON : 1985

S521-8

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RULEMAKING PROCEDURES REFORM ACT OF 1985—S. 1145

TUESDAY, JULY 9, 1985

U.S. Senate,
Subcommittee on Administrative Practice
and Procedure,
Committee on the Judiciary,
Washington, DC.

The subcommittee met, pursuant to notice, at 2:05 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Charles E. Grassley, chairman of the subcommittee, presiding.

Staff present: Ally Milder, chief counsel and staff director.

OPENING STATEMENT OF HON. CHARLES E. GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA, CHAIRMAN, SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE AND PROCEDURE

Senator Grassley. I would like to call this hearing of the Subcommittee on Administrative Practice and Procedure to order. I would like to welcome everybody who is here, particularly our members and distinguished witnesses who are on the program.

I would like to remind everyone that 4 years ago, a new administration and a new Senate majority took office, and that a new majority pledged to reduce the pervasive role of Government in everybody's lives.

Our targets at that time were a tax system which punished initiative and investment, wasteful Government spending which crowded out private sector activity, and pernicious Federal regulation which increased costs for businesses and consumers alike, while intruding on the prerogatives of families and communities.

Now, in these 4 years, Congress has joined with the administration in reducing taxes, and while we have yet to face squarely the inevitable consequences of mammoth deficits, we have at least slowed the growth of Federal spending.

Yet as we begin a second Reagan administration, and the third Congress since that shift in the Senate, Congress remains a seemingly hapless bystander in that third, equally vital area of limiting government power, which we refer to as regulatory reform. Though the Senate passed comprehensive regulatory reform legislation in 1982—and we did that by a 94-to-0 vote—Congress has not advanced since that high point in our effort.

In fact, Congress has suffered a setback in its participation in the regulatory reform process. That setback revolves around what I consider the centerpiece of the congressional role in the regulatory reform process—the legislative veto.

A large piece of the blame for the growth of the Federal regulatory morass falls on Congress for its willingness to abandon its oversight and legislative function in favor of a mass of faceless bureaucrats.

However, Congress had begun to reassert some of its control over the workings of the Government through its use of the legislative veto of agency actions, and seemed at that time prepared to flex its muscles still further by expanding its use of the device to all agency rules—that was until the Supreme Court stepped into the breach in the *Chadha* case.

In that case, the Court struck down the use of the legislative veto in more than 120 statutes, ruling that the device upset the constitutional scheme, dividing powers between the executive and legislative branches.

Now, because of the difficulties encountered to date in passing comprehensive regulatory reform legislation—and because I believe that the revival and expansion of the legislative veto is crucial to our efforts to make the operation of the Government subject once again to the consent of the governed, I have joined with my distinguished colleague, Senator Levin, in fashioning separate legislation creating a congressional veto which comports with the requirements the Supreme Court set out in *Chadha*.

Our legislation creates a two-step process for halting agency action. First, major agency rules, as defined under the bill, will be considered recommendations only, until 90 days after they have been reported to Congress. The waiting period for nonmajor rules is 45 days. During that waiting period, the appropriate committee may commence a joint resolution of disapproval, and the rule establishes procedures for expedited floor consideration of such a resolution.

After 60 days for major rules, and 30 days for a non-major rule, the committee may be discharged from consideration of the legislation by a vote of one-fifth of the members of that House of Congress. If Congress has not acted by the end of the waiting period, the rule may take effect.

Second, the passage of the joint resolution by both Houses of Congress gives rise to a point of order for any appropriations bill involving the relevant agency which does not bar use of government funds to implement the rule. For rules previously subject by law to a one-House veto, the passage of a joint resolution by either House of Congress would give rise to this same point of order.

Therefore, even if the President does not sign the joint resolution of disapproval mandated by *Chadha*, the agency in question will still be prevented from going forward with the rule from lack of funds. The practical effect of this legislation is to enable Congress to constitutionally overturn executive branch rules by the action of two Houses—an approach which was adopted by the Senate in the 97th Congress by a significant majority already referred to.

As Senator Levin and I come forward with this legislation, I recognize that the regulatory reform fervor within Congress has probably waned somewhat within the last 2 or 3 years. For one thing, the need to act now on reducing the budget deficit has dwarfed all other economic issues. And in fact, administration officials, engaged in an experiment with prior review of agency action under Executive Order 12498, have encouraged Congress to hold off until they have had a chance to review that process.

While I agree that a resolution of our budget crisis is the paramount issue of this Congress, I also believe that we can find time to move forward on an issue which has been a focus of congressional attention for nearly the last 10 years. A voluminous hearing record, including 10 days of hearings before the Judiciary Committee and 11 days before the Government Affairs Committee, preceded Senate action of our comprehensive regulatory reform proposal in 1982, further hearings followed by reintroduction of that proposal as S. 1080 in the 98th Congress, and specific hearings on the legislative veto question followed the *Chadha* decision.

And let me add that the experiment of the administration in tightening its own internal control of the regulatory process, while welcome, is no substitute for Congress' reestablishing its own prerogative to direct and oversee the operations of the executive branch.

This proposal is a workable, reasonable way for Congress to reassert itself in setting the policies that Americans must abide by at home, in the workplace and in the community. The breach left by *Chadha* must and will be filled. We cannot afford to let another session go by without taking action on this vital issue involving not just the interrelationship of the coequal branches of government, but the fundamental right of Americans to control their Government through the actions of their elected leaders.

S. 1145 has an impressive list of supporters including the Senate majority and assistant majority leaders, the distinguished chairman of the Judiciary Committee, and a number of others including, last but not least, the two Senators that we will hear from today.

[Statement follows:]

Statement by Senator Charles E. Grassley Regarding S. 1145, the Rulemaking Procedures Reform Act of 1985

Members and distinguished witnesses and guests, four years ago, a new Administration and a new Senate Majority took office and pledged to reduce the pervasive role of government in the everyday lives of Americans.

Our targets were a tax system which punished initiative and investment, wasteful government spending which crowded out private sector activity, and pernicious federal regulation which increased costs for businesses and consumers alike, while intruding on the prerogatives of families and communities.

In these four years, Congress has joined with the Administration in reforming that tax system. And while we have yet to face squarely the inevitable consequences of mammoth deficits, we have at least slowed the growth of federal spending.

Yet as we begin a second Reagan Administration, and the third Congress since that shift in the Senate, Congress remains a seemingly hapless bystander in that third, equally vital area of limiting government power: regulatory reform. Though the Senate passed comprehensive regulatory reform legislation in 1982—by a 94-0 vote—Congress has not advanced since that high point in our effort.

In fact, Congress has suffered a setback in its participation in the regulatory reform process. That setback revolves around what I consider the centerpiece of the Congressional role in the regulatory reform process: the legislative veto.

A large piece of the blame for the growth of the federal regulatory morass falls on Congress for its willingness to abandon its oversight and legislative function in favor of a mass of faceless bureaucrats.

However, Congress had begun to reassert some of its control over the workings of government through its use of the legislative veto of agency actions—and seemed prepared to flex its muscles still further by expanding its use of the device to all agency rules—until the Supreme Court stepped into the breach in *Chadha* v. *Immigration and Naturalization Service*.

In *Chadha*, the Court struck down the use of the legislative veto in more than 120 statutes, ruling that the device upset the Constitutional scheme dividing powers between the Executive and Legislative branches.

Because of the difficulties encountered to date in passing comprehensive regulatory reform legislation—and because I believe that the revival and expansion of the legislative veto is crucial to our efforts to make the operations of government subject once again to the consent of the governed—I have joined with my distinguished colleague Senator Levin in fashioning separate legislation creating a Congressional veto which comports with the requirements of *Chadha*.

Our legislation creates a two-step process for halting agency action. First, major agency rules, as defined under the bill, will be considered recommendations only, until 90 days after they have been reported to Congress. The waiting period for nonmajor rules is 45 days. During that waiting period, the appropriate committee may commence a joint resolution of disapproval, and the rule establishes procedures for expedited floor consideration of such resolution.

After 60 days for major rules, and 30 days for a nonmajor rule, the committee may be discharged from consideration of the legislation by a vote of one-fifth of the members of that House of Congress. If Congress has not acted by the end of the waiting period, the rule may take effect.

Second, the passage of the joint resolution by both Houses of Congress gives rise to a point of order for any appropriations bill involving the relevant agency which does not bar use of government funds to implement the rule. For rules previously subject by law to a one-house veto, the passage of a joint resolution by either House of Congress would give rise to this point of order.

Therefore, even if the President does not sign the joint resolution of disapproval mandated by *Chadha*, the agency in question will still be prevented from going forward with the rule by lack of funds. The practical effect of this legislation is to enable Congress to constitutionally overturn executive branch rules by the action of two houses—an approach which was adopted by the Senate in the 97th Congress by a significant majority.

As Senator Levin and I come forward with this legislation, I recognize that the regulatory reform fervor within Congress has waned somewhat. For one thing, the need to act now on reducing the budget deficit has dwarfed all other economic issues. And in fact, Administration officials, engaged in an experiment with prior review of agency action under Executive Order 12498, have encouraged Congress to hold off until they have had a chance to review that process.

While I agree that a resolution of our budget crisis is the paramount issue of this Congress, I also believe that we can find time to move forward on an issue which has been a focus of Congressional attention now for nearly ten years. A voluminous hearing record—including ten days of hearings before the Judiciary Committee and eleven days before the Government Affairs Committee—proceeded Senate passage of our comprehensive regulatory reform proposal in 1982, further hearings followed my reintroduction of that proposal as S. 1080 in the 98th Congress, and specific harings on the legislative veto question followed the *Chadha* decision.

And let me add that the experiment of the Administration in tightening its own internal control of the regulatory process, while welcome, is no substitute for Congress' reestablishing its own prerogative to direct and oversee the operations of the executive branch.

Mr. President, this proposal is a reasonable and workable way for Congress to reassert itself in setting the policies that Americans must abide by at home, in the workplace and in the community. The breach left by *Chadha* must be filled. We cannot afford to let another session go by without taking action on this vital issue involving not just the interrelationship of the coequal branches of government, but the fundamental right of Americans to control their government through the actions of their elected leaders.

S. 1145 has an impressive list of supporters including the Senate Majority and Assistant Majority leaders, the distinguished Chairman of the Judiciary Committee and a number of other including last but not least the two gentleman we are about to hear from.

[Material follows:]

S. 1145

By Mr. LEVIN (for himself, Mr. Grassley, Mr. Dole, Mr. Thurmond, Mr. Laxalt, Mr. Hatch, Mr. Simpson, Mr. Denton, and Mr. DeConcini):

S. 1145. A bill to increase the accountability of, policy coordination by, and management of priorities by agencies through an improved mechanism for congressional oversight of the rules of agencies; to the Committee on the Judiciary.

RULEMAKING PROCEDURES REFORM ACT

Mr. LEVIN. Mr. President, I am today joining with my colleague Senator Grassley, the current chairman of the Administrative Practices Subcommittee of the Senate Judiciary Committee, in introducing the Agency Accountability Act of 1985. Senators Dole, Boren, Thurmond, Laxalt, Hatch, Simpson, Denton, and DeConcini are also cosponsoring this measure, which we believe is a responsible answer to the Supreme Court's Chadha decision in which one and two House legislative vetoes were so sweepingly overturned.

Although the Supreme Court struck down through the breadth of its opinion the existing legislative vetoes over agency rulemaking, as well as legislative veto mechanisms in other areas such as foreign policy, budget and reorganization, the need for this shared-power mechanism has not diminished. Our attention has been focused on, and this bill addresses the area of, agency rulemaking. The executive branch and independent agencies continue to churn out thousands of regulations, directly and significantly affecting our lives, without the politically accountable involvement of the Congress. The reason and need for the legislative veto over agency rulemaking has not changed, only—because of the Supreme Court's decision—the mechanics of its procedures. The bill we are introducing meets the constitutional tests laid out by the Supreme Court in Chadha and at the same time gives Congress the power over these regulations which it should have to assure agency accountability to the public—without creating an unmanageable workload.

The Levin-Grassley legislative bill is similar in some respects to earlier versions, except that it provides for a prohibition on the appropriation of funds for the implementation of any rule for which a joint resolution of disapproval has been passed by both houses of Congress. It uses the constitutional mechanisms of a joint resolution of disapproval which was contained in the earlier versions of the Levin-Boren legislative veto, which means that both houses of Congress and the President are required to pass and sign, respectively, the disapproval resolution. This meets the essential elements of the Chadha decision, which requires involvement by both houses of Congress and presentment to the President.

The bill categorize rules into two areas—major and nonmajor. These are terms with which the agencies and Congress have been familiar over the past several years. The definition of a major rule is contained in the bill, and is the same definition as that contained in S. 1080, which passed the Senate by a vote of 94 to 0 in the 97th Congress.

The reason for distinguishing between major and nonmajor rules is to avoid any unnecessary delay in the implementation of noncontroversial rules. Major rules require more time for analysis because of their likely complexity, but it would be unfortunate to submit other rules which are simpler and less important to the same timeframe. Thus the bill establishes a 90-day delay period from the time the rule is sent to the Federal Register for publication as final and a 45-day delay period for nonmajor rules. "Days" are defined as legislative days. A rule may take effect during either the 90- or 45-day time periods if either House of Congress defeats a joint resolution of disapproval. Expedited procedures are included for the prompt consideration of a resolution of disapproval.

The bill adds the new and important provision establishing an internal mechanism for controlling the appropriation of funds for the implementation or administration of a controversial rule. If both Houses of Congress have passed a joint resolution of disapproval, but the President has vetoed the resolution and Congress has not overturned the veto, the appropriation of funds for that rule is restricted. In that situation a point of order will lie against final passage of any appropriations bill or resolution involving the agency with responsibility for the rule, unless the appropriations bill or resolution has a specific restriction in it which prohibits the use of any of the appropriated funds for the administration c. enforcement of the subject rule. This provision is constitutional because it is a housekeeping measure, internal to the Congress. It is not a legislative act requiring presentment to the President; it is merely a statement of Congress' internal rule of procedures with regard to regulations which have been disapproved by both Houses.

Mr. President, Senator Grassley and our other cosponsors have given a great deal of thought to the subject of an appropriate response to the Chadha decision. In the interests of achieving a governmentwide legislative veto mechanism over agency rulemaking we have engaged in a lot of give and take. We are proud of this final product, because it is effective, constitutional and reasonable. I hope our colleagues will join us in support of this measure.

I ask unanimous consent that a copy of the legislation be printed following my remarks.

There being no objection, the bill was ordered to be printed in the Record, as follows:

S. 1145

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Rulemaking Procedures Reform Act of 1985".

Sec. 2. (a) Section 551 of title 5, United States Code, is amended—

(1) by striking out paragraph (4) and inserting in lieu thereof the following:

"(4) 'rule' means the whole or part of an agency statement of general or particular applicability designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of an agency and includes—

"(A) the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor, or of valuations, costs, or accounting, or practices bearing on any of the foregoing; and

"(B) any amendment, revision, or repeal of such an agency statement.";

(2) by striking out the word "and" in paragraph (13);

(3) by striking out the period at the end of paragraph (14) and inserting a semicolon and the word "and"; and

(4) by inserting immediately after paragraph (14) the following new paragraph:

"(15) 'emergency rule' means a rule which is temporarily effective prior to the expiration of the otherwise specified periods of time for public notice and comment under this subchapter and which was duly promulgated by an agency pursuant to a finding that delay in the effective date thereof would—

"(A) seriously injure an important public interest,

"(B) substantially frustrate legislative policy and intent, or

"(C) seriously damage a person or class of persons without serving any important public interest.".

(b) Section 553(b) of such title is amended by striking out clause (B) and inserting in lieu thereof the following:

"(B) when the agency for good cause finds that public notice and comment are unnecessary due to the routine nature or matter or insignificant impact of the rule, or that an emergency rule should be promulgated.

An agency which finds that clause (A) or (B) of this subsection applies to a rule shall publish in the Federal Register with the final rule a statement of such finding and a brief description of reasons for such finding. The provisions of clauses (A) and (B) of this subsection shall not preclude an agency from—

"(i) inviting persons representing different points of view to submit comments,

"(ii) creating an advisory committee to report, or

"(iii) using such other devices to obtain suggestions,

regarding the content of proposed rules prior to notice of rule making.".

(c) Section 553 of such title is amended—

(1) by striking out subsection (c) and inserting in lieu thereof the following:

"(c) Except as provided in subsection (e) with respect to an emergency rule, and after notice required by this section, the agency shall give interested persons not less than 60 days to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. The agency may extend the 60-day period if the agency determines that such period is insufficient to permit diligent interested persons to prepare comments or that other circumstances justify an extension of such period. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.";

(2) by redesignating subsection (e) as subsection (f); and

(3) by inserting after subsection (d) the following new subsection:

"(e) Unless earlier withdrawn by the agency, earlier disapproved by a joint resolution of Congress pursuant to chapter 8 of this title, or earlier set aside by court action, an emergency rule shall terminate 120 days after the date on which it is promulgated.".

SEC. 3. (a) Title 5, United States Code, is amended by inserting after chapter 7 the following new chapter:

"CHAPTER 8—AGENCY ACCOUNTABILITY

"Sec.
"801. Findings and purposes.
"802. Definitions.
"803. Agenda; transmission of rules.
"804. Review of agency rules.
"805. Procedures for consideration of joint resolutions.
"806. Relationship to other law.
"807. Enforcement.

"§ 801. Findings and purposes

"(a) The Congress finds and declares that—

"(1) agencies issue a large number of rules that have a significant impact on the Nation;

"(2) these agencies are staffed by persons who are not elected and who are therefore not directly accountable to the public;

"(3) some of the rules issued by these agencies may conflict with or duplicate other rules or may not conform with legislative intent;

"(4) conflicting or duplicative rules may contribute to governmental inefficiency, and rules which do not conform with legislative intent may frustrate the purposes and implementation of congressionally mandated programs; and

"(5) conflicting or duplicative rules and rules which do not conform with legislative intent may also impose unnecessary burdens on State and local governments.

"(b) Therefore, it is the purpose of this chapter to assure increased agency accountability to the public through their elected officials and through adherence to legislative intent in the issuance of agency rules.

"§ 802. Definitions

"For purposes of this chapter:

"(1) The term 'agency' has the same meaning as in section 551(1) of this title.

"(2) The term 'rule' has the same meaning as in section 551(4) of this title, except that such term does not include—

"(A) a rule or statement described in section 553(b)(A) of this title, unless such rule or statement has general applicability and substantially alters or creates rights or obligations of persons outside the agency;

"(B) a rule of particular applicability that approves or prescribes for the future rates, wages, prices, services, or allowances therefor, corporate or financial structures, reorganizations, mergers, or acquisitions thereof, or accounting practices or disclosures bearing on any of the foregoing; and

"(C) a rule if—

"(i) the agency made a finding with respect to such rule under section 553(b)(B) of this title; and

"(ii) on the date on which the agency promulgates the rule, the head of the agency submits a copy of the statement required to be published in the Federal Register under such section to the chairman and ranking minority member of the appropriate committees.

"(3) The term 'joint resolution' means only an unamendable joint resolution which contains no preamble and the matter after the resolving clause of which is as follows: 'That the Senate and the House of Representatives disapprove the recommended final rule issued by   dealing with the matter of   , which rule was transmitted to the Congress on   .', the first blank being filled with the name of the agency issuing the rule, the second blank being filled with the title of the rule and such further description as may be necessary to identify it, and the third blank being filled with the date of transmittal of the rule to the Congress.

"(4) The term 'appropriate committee' means the committee of the House of Representatives and the committee of the Senate which has primary legislative jurisdiction over the statute pursuant to which an agency issues a rule.

"(5) The term 'major rule' means—

"(A) a rule or a group of closely related rules that the agency, the President, or an officer of the Government designated by the President reasonably determines is likely to have an annual effect on the economy of $100,000,000 or more in reasonably quantifiable direct and indirect costs; or

"(B) a rule or a group of closely related rules that is otherwise designated a major rule by the agency proposing the rule, or is so designated by the President or an officer of the Government designated by the President, on the ground that the rule is likely to result in—

"(i) a substantial increase in costs or prices for wage earners, consumers, individual industries, nonprofit organizations, Federal, State, or local government agencies, or geographic regions; or

"(ii) significant adverse effects on competition, employment, investment, productivity, innovation, the environment, public health or safety, or the ability of enterprises whose principal places of business are in the United States to compete in domestic or export markets.

"(6) The term 'emergency rule' has the same meaning as in section 551(15) of this title.

"§ 803. Agenda; transmission of rules

"(a) Each agency shall prepare an agenda listing all areas in which the agency intends to propose rules within the following twelve-month period. The agency shall transmit such agenda or relevant portion thereof to the appropriate committee of the Senate and the appropriate committee of the House of Representatives. Failure to list an area of possible rule making on an agenda shall not preclude an agency from proposing or issuing any rule. The agenda, or relevant portion thereof, shall be transmitted to the appropriate committees within one hundred and eighty days after the effective date of this chapter and semiannually thereafter.

"(b) On the day an agency forwards to the Federal Register for publication a recommended final rule, the agency shall transmit to the Secretary of the Senate and the Clerk of the House of Representatives a copy of such rule and a copy of any other materials transmitted to the Federal Register for publication with respect to such rule. The Secretary of the Senate and the Clerk of the House of Representatives are authorized to receive a recommended final rule under this subsection whether the appropriate House is in session, recess, or adjournment.

"(c) On the day on which the Secretary of the Senate and the Clerk of the House of Representatives receive a recommended final rule, the Secretary and the Clerk shall transmit a copy of such rule and any materials received with respect to such rule to the appropriate committees.

"§ 804. Review of agency rules

"(a) For purposes of this section and section 805 of this title—

"(1) 'days' means only days of continuous session of Congress;

"(2) continuity of session is broken only by an adjournment sine die at the end of a Congress; and

"(3) the days on which either House is not in session for more than three days because of an adjournment or recess to a day certain shall be excluded in the computation of days of continuous session of Congress.

"(b) Notwithstanding any other provision of law, any final rule shall be considered a recommendation of the agency to the Congress and shall have no force and effect as a rule unless such rule has become effective in accordance with this chapter.

"(c)(1) Notwithstanding any other provision of law, a recommended final rule shall become effective in accordance with its terms unless—

"(A) in the case of a recommended final major rule, a joint resolution is enacted into law within 90 days after the first day of continuous session of Congress after the day on which such rule is received by the Secretary of the Senate and the Clerk of the House of Representatives under section 803(b) of this title; or

"(B) in the case of a recommended final nonmajor rule, a joint resolution is enacted into law within 45 days after the first day of continuous session of Congress after the day on which such rule is received by such Secretary and such Clerk under such section.

"(2) Whenever an appropriate committee reports a joint resolution pursuant to this chapter, the joint resolution shall be accompanied by a committee report specifying the reasons for the committee's action.

"(d) Notwithstanding paragraph (1) of subsection (c), a recommended final rule may become effective at any time after the day on which either House of Congress defeats a joint resolution, and, in the case of the Senate, a motion to reconsider such joint resolution is disposed of.

"(e) If Congress adjourns sine die at the end of a Congress prior to the expiration of the period specified in subparagraph (A) of subsection (c)(1) with respect to a recommended final major rule, or prior to the expiration of the period specified in subparagraph (B) of such subsection with respect to a recommended final nonmajor rule, as the case may be, the rule shall not become effective during that Congress. The agency which issued such recommended final rule may transmit such rule at any time after the first day of the following Congress in accordance with section 803(b) of this title, and the period specified in subparagraph (A) or (B) of subsection (c)(1), as the case may be, with respect to such rule shall begin on the day such rule is transmitted to the Congress.

"(f)(1) If a recommended final rule of an agency does not become effective under this chapter, the agency may issue a recommended final rule which relates to the same acts or practices as the rule which did not become effective under this chapter. Such recommended final rule—

"(A) shall be based upon—

"(i) the rule making record of the recommended final rule which did not become effective under this chapter; or

"(ii) such rule making record and the record established in supplemental rule making proceedings conducted by the agency in accordance with section 553 of this title, in any case in which the agency determines that it is necessary to supplement the existing rule making record; and

"(B) may reflect such changes as the agency considers necessary or appropriate (including such changes as may be appropriate in light of congressional debate and consideration of the joint resolution with respect to the rule).

"(2) An agency, after issuing a recommended final rule under this subsection, shall transmit such rule to the Secretary of the Senate and the Clerk of the House of Representatives in accordance with section 803(b) of this title, and such rule shall only become effective in accordance with this chapter.

"(g) Congressional inaction on or rejection of a joint resolution with respect to a recommended final rule shall not be deemed an expression of approval of such rule.

"§ 805. Procedure for consideration of joint resolutions

"(a) The provisions of this section and sections 803(d), 804(c), and 804(c)(2) of this title are enacted by Congress—

"(1) as an exercise of the rulemaking power of the Senate and the House of Representatives, respectively, and as such they are deemed a part of the rules of each House, respectively, but applicable only with respect to the procedure to be followed in that House in the case of joint resolutions; and they supersede other rules only to the extent that they are inconsistent therewith; and

"(2) with full recognition of the constitutional right of either House to change the rules (so far as relating to the procedure of that House) at any time, in the same manner and to the same extent as in the case of any other rule of that House.

"(b) Except as provided in subsection (c) of this section, joint resolutions shall, upon introduction or receipt from the other House of Congress, be immediately referred by the presiding officer of the Senate or the House of Representatives to the appropriate committee of the Senate or the House of Representatives, as the case may be.

"(c)(1)(A) Except as provided in subparagraph (B) of this paragraph, if the committee to which a joint resolution has been referred does not report such joint resolution—

"(i) in the case of a joint resolution with respect to a recommended final major rule, within 60 days after the first day of continuous session of Congress after the day on which such rule is received by the Secretary of the Senate and the Clerk of the House of Representatives under section 803(b) of this title;

"(ii) in the case of a joint resolution with respect to a recommended final nonmajor rule, within 30 days after the first day of continuous session of Congress after the day on which such rule is received by such Secretary and such Clerk under such section,

it shall be in order to move to discharge the committee from further consideration of such joint resolution.

"(B) If the committee to which a joint resolution transmitted from the other House has been referred does not report such joint resolution—

"(i) in the case of a joint resolution with respect to a recommended final major rule, within 20 days after the date of transmittal of such joint resolution from the other House; or

"(ii) in the case of a joint resolution with respect to a recommended final nonmajor rule, within 10 days after the date of transmittal of such joint resolution from the other House,

it shall be in order to move to discharge such committee from further consideration of such joint resolution.

"(2)(A) Any motion to discharge under paragraph (1) of this subsection in the Senate may be made by one Senator and is privileged (except that it may not be made after a joint resolution has been reported with respect to the same rule).

"(B) Any motion to discharge under paragraph (1) of this subsection in the House of Representatives must be supported in writing by one-fifth of the Members of the House of Representatives, duly chosen and sworn, is highly privileged, and may be filed—

"(i) in the case of a joint resolution with respect to a recommended final major rule, 30 days after the first day of continuous session of Congress after the day on which the Secretary of the Senate and the Clerk of the House of Representatives receive such rule under section 803(b) of this title; or

"(ii) in the case of a joint resolution with respect to a recommended final nonmajor rule, 10 days after the first day of continuous session of Congress after the day on which such Secretary and such Clerk receive such rule under such section.

"(C) Debate on any motion to discharge under paragraph (1) of this subsection in the Senate or the House of Representatives shall be limited to not more than one hour, the time to be divided in the Senate equally between, and controlled, by the majority leader and the minority leader or their designees, and to be divided in the House of Representatives equally between those favoring and those opposing the motion to discharge. An amendment to the motion is not in order.

"(d)(1) Except as provided in paragraphs (2) and (3) of this subsection, consideration of a joint resolution shall be in accord with the rules of the Senate and of the House of Representatives, respectively.

"(2) When a committee has reported or has been discharged from further consideration of a joint resolution, or when the companion joint resolution from the other House has been placed on the calendar of the first House, it shall be in order, notwithstanding the provisions of rule XXII of the Standing Rules of the Senate or any other rule of the Senate or the House of Representatives, at any time thereafter (even though a previous motion to the same effect has been disagreed to) to move to proceed to the immediate consideration of either such joint resolution. The motion is highly privileged in the House and privileged in the Senate and is not debatable. An amendment to the motion is not in order.

"(3) Debate on a joint resolution shall be limited to not more than two hours (except that when one House has debated its joint resolution, the companion joint resolution shall not be debatable), which shall be divided in the House of Representatives equally between those favoring and those opposing the joint resolution and which shall be divided in the Senate equally between, and controlled, by the majority leader and the minority leader or their designees. A motion further to limit debate is not in order. An amendment to, or motion to recommit, the joint resolution is not in order. A motion to reconsider shall be in order only on the day on which occurs the vote on adoption of the joint resolution, and shall not be debatable. Any other motions shall be decided without debate.

"(e) If a joint resolution has been ordered reported or discharged from the committee of the House to which it was referred, and that House receives a joint resolution with respect to the same rule from the other House, the joint resolution of the other House shall be placed on the appropriate calendar of the first House. If prior to the disposition of a joint resolution of one House, that House receives the companion joint resolution from the other House, the vote in the first House shall occur on the joint resolution of the other House.

"§ 806. Relationship to other law

"The provisions of this chapter supersede any other provision of law requiring action by one or both Houses of Congress for congressional review or disapproval of agency rules to the extent such other provisions are inconsistent with this chapter.

"§ 807. Enforcement

"(a) This section is adopted as an exercise of the power of each House of Congress to determine the rules of its proceedings. The Congress specifically finds that the provisions of this section are essential to the Congress in exercising its constitutional responsibility to monitor and to review exercises by the Executive of delegated powers of a legislative character.

"(b) Except as provided in subsection (c) of this section, after the Senate and the House of Representatives adopt a joint reso-

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lution with respect to a rule pursuant to this chapter, it shall not be in order in the Senate or the House to vote on final passage of any bill or resolution making appropriations for the agency which issued such rule unless such bill or resolution contains provisions which prohibit the use of any funds appropriated by such bill or resolution to issue, promulgate, enforce, or otherwise carry out such rule.

"(c) In any case in which, prior to the effective date of this chapter, Federal law provided that a rule subject to this chapter could not take effect if such rule was disapproved by action of only one House of Congress, the provisions of subsection (b) of this section shall apply to such rule on and after the date on which either the Senate or the House of Representatives passes a joint resolution under this chapter with respect to such rule.

"(d) An appeal of a ruling of the presiding officer sustaining a point of order raised under this section shall require the approval of a majority of members of the Senate or the House of Representatives, as the case may be, present and voting, to overrule the ruling of the Presiding Officer. On all appeals under this section there shall be one hour of debate equally divided.".

(b) The table of chapters for part I of such title is amended by inserting after the item relating to chapter 7 the following new item:

"8. Agency Accountability .... 801.".

SEC. 4. This Act and the amendments made by this Act shall take effect on the first day of the One Hundredth Congress.

Senator **Grassley**. I now turn to our panel of Senators and ask Senator Levin to proceed first and then Senator Boren.

Senator **Levin**. Senator Boren will go first because of his schedule this afternoon, Mr. Chairman.

Senator **Grassley**. OK. Senator Boren, would you proceed?

STATEMENT OF A PANEL INCLUDING HON. DAVID BOREN, A U.S. SENATOR FROM THE STATE OF OKLAHOMA, AND HON. CARL LEVIN, A U.S. SENATOR FROM THE STATE OF MICHIGAN

Senator **Boren**. Thank you very much, Mr. Chairman, and I appreciate the opportunity to make some brief remarks. I do have to go over to a meeting having to do with the drafting of the farm bill this year, which I know is another subject that is near and dear to the heart of the chairman of these hearings today.

First, I want to commend you for the leadership which you have shown in this area of regulatory reform, and it has been a pleasure to work with you over the past 2 or 3 years on this subject. You have been committed to it, and certainly, we have benefited from your leadership in this area.

I am pleased to be here this afternoon to speak in support of S. 1145, better known as the legislative veto bill, and to gain cosponsor this legislation with you and with Senator Levin.

The bill has very basic goals: To increase accountability, policy coordination, and management of priorities by agencies for an improved mechanism for congressional oversight of the rules of these agencies.

Congress has a constitutional responsibility to monitor and review mandates of our governmental agencies. While we do delegate a great deal of the implementation of such policies of these agencies, it is our job to see that this policy is carried out within the bounds of congressional intent. The people have a right to expect that final policy decisions are made by those who are elected by the people and accountable to them. Many of the rules and regulations which agencies issue not only cause redtape, frustration, lengthy delays, and paperwork, but often impose severe economic hardship on individuals and businesses in this country. Small businesses are especially hard hit.

It only seems right that the elected and accountable representation in our Congress should have the responsibility and opportunity to intervene before these kinds of rules are produced by our appointed agencies and before they come into effect. Much of the debate on the floor of the Senate and measures considered by both Houses of Congress are reactive in nature. When agencies or appointed officials make rulings that are clearly beyond the intent of Congress, we must go through excessive obstacles to reverse those policies. Often, intervention after the fact can come too late to prevent the expenditure of large amounts of money by the private sector to comply with these unneeded regulations. If Congress could only react after a regulation has gone into effect, it is often too late to prevent the damage to the group which has been affected. It is like closing the barn door after the horse has already escaped.

The duty of oversight by the Congress is a very important responsibility. The rulemaking procedures reform legislation would allow Congress to have a 90-day limit, as you pointed out, to consider the implications of a major rule change with an economic impact of over $100 million—and that is the way we define a "major rule", that having an economic impact of over $100 million.

The 45-day limit would be in effect for the other rules or policies coming from agencies. Some have criticized the 90-day allowance for congressional action and review. However, that would be far better than the delays that have spanned over 2 or 3 years—even entire sessions of the Congress—in taking remedial action.

Certainly, you on this subcommittee have heard the staggering statistics of the extent and capacity of bureaucratic regulation. The Code of Federal Regulations at present fills over 111,830 pages, contained in 191 volumes, which take up 18 feet in shelf length. This represents tremendous time and economic burden being placed upon the people, often without advance review by their own elected representatives.

I will add that we can all appreciate the fact that some discretion is essential in the massive job of administering of the many assorted programs and activities of our Federal Government. However, at the same time, we cannot neglect our duty in the Congress to oversee and review how our intended legislative goals are being carried out.

Further, I am personally very appreciative for the hard work, dedication, and services of those persons employed by or appointed to these executive agencies and positions. Their service is crucial to running our Nation, serving our citizens. Many civil servants and appointees sacrifice what could be more economically profitable careers for them and for their families because of a sincere desire to serve our country. In no way do I denigrate this group of civil servants and public officials who serve so well. However, we must keep in mind a basic precept. Our Government is the Government of the people. Laws should not be made by bureaucrats who are not elected by and accountable to the people.

Again, Mr. Chairman, I want to thank you for the opportunity to appear. I want to thank you for your leadership on this subject. I appreciate it very much, as I do the leadership of my distinguished colleague from Michigan, Senator Levin, who of course, has taken the initiative time and time again to bring this subject before the Congress.

I hope this will be the year, even with other items on the agenda, when we finally take action, bring our rules in compliance with the Supreme Court decision, and yet come up with a practical and workable system for making sure that we keep the democracy intact, that the laws and rules are made by those elected by the people.

I urge the subcommittee's support of this measure.

Senator **Grassley**. I thank you very much, and if you do have to leave, you may read the record and see if you wish to respond in writing to any questions that I might have asked Senator Levin.

Senator **Boren**. I appreciate that very much. Thank you.

Senator **Grassley**. Senator Levin.

Senator **Levin**. Mr. Chairman, first let me thank you and congratulate you on your leadership in this area, and thank my good friend and longstanding cohort in this effort, Senator Boren, who on the first day he arrived here, started talking to me, and me to him, and you, and others, about doing something in the area of legislative veto. He has been a stalwart in this area, and the fact that he has remained so interested in this matter despite all the other obligations and interests he has is, I believe, a great testimony not just to him, but to the importance of the subject.

Mr. Chairman, I am pleased to have you and Senator Boren as our principal cosponsors, along with our other colleagues, as you have indicated, Senators Dole, DeConcini, Laxalt, Thurmond, Hatch, Simpson, and Denton.

We have introduced this bill because we believe it is a responsible answer to the Supreme Court's decision in *Chadha,* in which the concept of one- and two-House legislative vetoes was so sweepingly rejected.

Although the Supreme Court struck down, through the breadth of its opinion, the existing legislative vetoes over agency rulemaking as well as legislative veto mechanisms in other areas, such as foreign policy, budget, and reorganization, the need for this shared-power mechanism has not diminished. Congress must now revisit each of these areas to reestablish a mechanism which is consistent under the terms of *Chadha.*

S. 1145 accomplishes that objective in the area of agency rulemaking, which has been our principal concern regarding legislative veto for almost a decade.

The executive branch and independent agencies continue to churn out thousands of regulations, directly and significantly affecting our lives, without the politically accountable involvement of the Congress. As a result of the *Chadha* decision, many agencies over which we had imposed certain legislative veto provisions are no longer covered, including the Department of Education, the Federal Election Commission, the Social Security Administration, the Federal Trade Commission, the Pension Benefit Guarantee Corporation, and on and on.

The reason and need for the legislative veto over agency rulemaking has not changed, only—because of the Supreme Court's decision in *Chadha*—the criteria for the constitutionality of its procedures have changed.

The bill that you are considering today, forms of which I have been working on and supportive of since I took office, meets the constitutional test laid out by the Supreme Court in *Chadha* and at the same time gives Congress the power over regulations which it must have to assure agency accountability to the public. It does this without creating an unmanageable workload.

Our bill is similar in many respects to earlier versions, except that it restricts the appropriation of funds for the implementation of any rule for which a joint resolution of disapproval has been passed by both Houses of the Congress.

We are using the very clear constitutional congressional power over the purse, and we are combining it with a constitutional mechanism of a joint resolution of disapproval contained in the earlier versions of the Levin-Boren legislative veto. This requires both Houses of Congress and the President to respectively pass and sign the disapproval resolution. The essential elements of the *Chadha* decision, which requires involvement by both Houses of Congress and presentment to the President, are thereby met.

The bill categorizes rules into two areas—major and nonmajor. These are terms with which the agencies and Congress have been familiar over the past several years. The definition of a major rule is contained in the bill and is the same definition as that contained in S. 1080, which passed the Senate by a vote of 96 to 0 in the 97th Congress. It basically means a rule that has an annual impact of over $100 million.

The reason for distinguishing between major and nonmajor rules is to avoid any unnecessary delay in the implementation of noncontroversial rules. Major rules require more time for analysis because of their likely complexity, but it would be unfortunate to submit other rules which are simpler and less important to the same timeframe.

Thus, the bill establishes a 90-day delay period from the time a major rule is sent to the Federal Register for publication as final and a 45-day delay period for nonmajor rules. "Days" are defined as legislative days. A rule may take effect during either the 90- or 45-day time period if either House of Congress defeats a joint resolution of disapproval.

A very important provision is the section on expedited procedures, included in the bill to guarantee the prompt consideration of a resolution of disapproval. These expedited procedures enable Congress to consider a joint resolution within the mandated timeframe, ensuring congressional attention to these important regulatory issues.

Mr. Chairman, the bill also adds a new and important provision establishing an internal mechanism for controlling the appropriation of funds for the implementation or administration of a controversial rule, as I mentioned earlier. If both Houses of Congress have passed a joint resolution of disapproval, but the President has vetoed the resolution and Congress has not overturned the veto, the appropriation of funds for that rule is restricted. In that situation a point of order will lie against final passage of any appropriations bill or resolution involving the agency with responsibility for the rule, unless the appropriations bill or resolution contains a specific restriction which prohibits the use of any of the appropriated funds for the administration or enforcement of the subject rule.

This provision is constitutional, because it is a housekeeping measure, internal to the Congress, and is not a legislative act requiring presentment to the President. It is merely an amendment to Congress' internal rules of procedure with regard to the appropriations process where regulations have been disapproved of by both Houses. Yet it adds teeth to the joint resolution by basically giving Congress alone the authority to stop a rule. Congress acting alone, in other words, can stop a rule of which it has disapproved.

Now, some will argue—and legitimately so—that we have always had that power. Anyone could amend an appropriations bill with a rider restricting the use of the funds. But the exercise of that power has been on an ad hoc basis and vulnerable to the objections of one Member of the Senate through the threat of a filibuster to that amendment. This bill would formalize the process by which appropriations would be restricted where a majority of the Members in both Houses of Congress have spoken by passing a joint resolution of disapproval. Where Congress has thus acted, and in so doing debated the substantive issues at length, it should be able to see its actions implemented without additional roadblocks or delays. All this provision says is that when Congress has acted, its will should not be thwarted.

Mr. Chairman, you and I and our other cosponsors have given a great deal of thought to the subject of an appropriate response to the *Chadha* decision. In the interest of achieving a governmentwide legislative veto mechanism over agency rulemaking, we have engaged in a lot of give and take. I am proud of this product, as I know you are. While it is a compromise between previously competing proposals, it is effective, constitutional, and reasonable. I hope our colleagues on the committee will join us and Senator Boren and our other cosponsors in support of this measure and report it to the Senate floor for consideration as quickly as possible.

Senator **Grassley**. Thank you, Senator Levin.

I would like to use this hearing primarily to discuss the particulars of S. 1145—and of course, this is a similar amendment to what will be proposed to the FTC authorization bill—rather than discuss the policy reasons behind Congress' desire for an effective congressional oversight mechanism for agency rules. We have concluded that the legislative veto is a vehicle Congress supports, and we have adequately demonstrated that over the years.

What we are concerned with today is not whether implementation of the legislative veto is a desirable policy, but how to implement a congressional veto that will be effective and comport with the constitutional requirements of *Chadha*.

One point that has been raised against the approach taken by S. 1145 is that the point of order on appropriation bills is a procedure that is unnecessary and cumbersome—that is, as you correctly pointed out in your statement, any Member can amend an appropriation bill on the floor. The opponents of this measure like to rely on the old adage that if it is not broken, don't bother to fix it—in other words, that we do not gain anything through the Levin-Grassley bill that we do not already have.

The way I see it, if an appropriation bill reaches the floor without the limiting language, not only do we subject that bill to a floor amendment relating to the limitation question, but we also run the risk of opening the bill up to further unrelated floor amendments—similar to the Grove City situation last fall, which was a real breakdown of the appropriation process. To me our proposal guards against this eventuality, and instead of complicating the appropriation process, I think it simplifies it.

Senator **Levin**. Mr. Chairman, I agree with you totally. We are trying to reduce the threat of procedural delays, filibusters, of nongermane amendments, in those situations where Congress has already acted—and that is the critical issue here. Congress has already by a joint resolution vetoed a regulation. In those situations, Congress' will should not be thwarted by procedural delay, by nongermane amendment, by filibuster. And this approach, which says the bill itself coming from committee should contain the prohibition on the spending of funds, where Congress has vetoed the regulation for which those funds would be spent, is a way of reducing the risk of those kinds of procedural delays.

So you are exactly right. Congress, in the assumption that we have set up, has already acted; its will should be carried out and not thwarted. This point of order mechanism is an internal way, a totally constitutional way, of helping to be sure that Congress' will is carried out and not thwarted.

Senator **Grassley**. Now there is yet another fear expressed by the opponents of S. 1145 and that is that the appropriation committees will be subjected to outside pressures from organizations supporting or opposing a particular rule where that pressure normally would be directed toward the authorization committees.

In that the language limitation will never be an issue unless both Houses of Congress pass a disapproval resolution—which, by the way, would involve the authorizing committees and require them to pass on the resolutions—do you think that this is a valid concern? I am aware of at least three of last year's appropriation bills which contained such limiting language—H.R. 5743, H.R. 5712, and H.R. 5798—and particularly H.R. 5712, appropriating funds to the FTC and involving that one, it seems to me that Congress has, to a large extent, already spoken on this issue and agreed with our approach.

Senator **Levin**. Mr. Chairman, the Appropriations Committee indeed argues that it already has this power to prohibit the expenditure of funds on an ad hoc basis, so it has the power; it has exercised it, as you pointed out in your question, on a number of times, and it does it all the time.

The question is whether or not we want to leave it to an ad hoc implementation or whether or not, when Congress has acted through a vote of both Houses. But has been thwarted by a veto of the President, we want the bill automatically coming from an Appropriations Committee to contain the prohibition. That is the only issue. Frequently in the past, the Appropriations Committee has done this on an ad hoc basis. It claims that such power can be exercised in the same manner in the future. We want to put some teeth in the legislative veto by placing it in the appropriations bill automatically, and if it is not there, subject it to a point of order.

Senator **Grassley**. The first test of the proposal, of course, will come on the FTC authorization bill. What is the status of the current FTC legislative veto provisions, and why is it important to address this particular piece of legislation?

Senator **Levin**. It is important, Mr. Chairman, because the Supreme Court struck down the prior FTC legislative veto in a summary ruling at the same time it issued the used car ruling. It is no longer in effect; it needs new action, and with you leading the fight for this on the floor. I am hopeful that we can succeed in putting into effect a constitutional veto similar to this on the FTC legislation.

Senator **Grassley**. With the precedent of H.R. 5712, plus Congress' previous determination that a two-House veto over FTC rules is desirable, how serious will our opposition be?

Senator **Levin**. I think there is going to be opposition from people who feel that we are having an unnecessary impact on the appropriation process, so I think we can expect opposition. I know the chairman of the Appropriations Committee has testified in opposition to this approach before. I hope that we can still persuade him that it is an extremely reasonable approach which will not gum up in any way the appropriations process, that it has a very limited impact on that process, and is something he ought to welcome. It highlights, simply highlights, the instances where Congress has vetoed a regulation, but where its will has been thwarted by a Presidential veto. And I would hope that the chairman of the Appropriations Committee, whoever he or she might be in the future, would welcome that and not view it being a possible threat to the appropriations process.

Senator **Grassley**. Well, in thanking you a second time, let me highlight what I should have said in your introduction, and that is, as far as this compromise is concerned, you were out in front, and its success will result from the hard work and time you put into it. Your leadership in this area has been recognized, and our success will cap several other successes you have had in this area.

Senator **Levin**. Well, I thank the chairman again and am grateful to him for the leadership and support that he has shown in this area over the years, and there are many outside groups that have supported this approach, Mr. Chairman; I should not single anybody out on the outside, but I will at any rate–Stu Eizenstat is entitled to particular mention, because I think the inside approach which we are using in this bill and in the amendments which you will be offering on the FTC bill, is one which at least he wrote about some years ago, and I do not know if this is exactly the same, and he can defend himself; I know he is here today. Anyway, I do appreciate some of the creative thinking that he and so many others on the outside of this body have contributed to this effort.

Senator **Grassley**. Well, thank you very much. And let me say that if you want to remain here and question witnesses, you are welcome to do so.

Senator **Levin**. I will try to return in a few minutes, if I possibly can, and I thank the Chair for offering me that.

Senator **Grassley**. Thank you.

I would like to now welcome our next witness, Congressman Jim Broyhill from North Carolina. He is a person I had the good fortune of becoming better acquainted with during the 6 years I was in the House, and he has been there much, much, much longer than that, probably longer than he wants to remember.

For a long period of time, he has served as ranking minority member of the House Energy and Commerce Committee, and he has maintained an active interest in the legislative veto, and I remember the years I was there, his leadership in that area.

I thank you very much for coming, particularly considering the fact that you have a tight schedule.

Would you now proceed with your testimony?

STATEMENT OF HON. JAMES BROYHILL, A U.S. REPRESENTATIVE FROM THE STATE OF NORTH CAROLINA

Mr. **Broyhill**. Thank you, Mr. Chairman.

I do appreciate your asking me to testify today and agreeing to hear me for a few minutes. Having served in the House, and the fact that my schedule is very tight this afternoon, I would appreciate if you would recognize me under the 5-minute rule of the House. I will be glad to submit my statement for the record.

Senator **Grassley**. I guess at this point, I would take the opportunity to say that I did not remind the Members of that, and the extent to which that is the tradition. Although it has to be requested by each individual committee, it is pretty much a tradition I like to follow. Every testimony will be included in the record, and we would ask you to summarize.

Mr. **Broyhill**. Thank you very much. I just want to make three or four points.

First, of course, I want to congratulate you and the sponsors of S. 1145. I think this is a great piece of legislation.

We have been frustrated, of course, in this whole effort on legislative veto. Although we are beginning to make some progress on it, we were set back by the Supreme Court decision in *Chadha*, which have already discussed in your colloquy with Senator Levin.

I find that the need for this kind of procedure continues to grow. The Federal bureaucracy is not getting any smaller. It is continuing to grow and to expand. The number of rules and regulations that are being issued continues to mount. It is a fact that the number has slowed down somewhat, but overall it continues to go up.

Many of these regulations are not only complex, but they impose an enormous cost on the economy, business, and the consumer. We are concerned about imports into this country. We have way in excess of a $100 billion trade deficit. We are concerned over the ability of our economy not only to be able to improve, but to be able to compete in world markets. At a time of rising imports into this Nation, I think that ill-advised, unnecessary, and expensive regulations hinder our ability to compete in these markets.

These regulations also affect States and even overturn State statutes.

The fact is that these agencies and those of the executive branch have the power to impose rules that have the full force and effect of law. Congress has delegated this kind of broad lawmaking, not rulemaking, but lawmaking function, to these agencies and departments. It is my firm opinion that the Congress of the United States has an obligation, even more, responsibility, to review their end work product.

And so, what the legislative review and veto procedure does is to enable Congress to review these regulations and to check the unbridled authority of these agencies. I think it is an effective tool to ensure agency accountability and also responsiveness to Congress.

Mr. Chairman, I thought I should comment on one matter. I think you well know I do prefer the approval process. However, I realize that a consensus in Congress is going to have to be achieved, and I do think that the majority of support can be gathered for the disapproval process. But to be workable, it has to include an addition that you put in, and that is expedited procedures. Otherwise, some of these disapproval resolutions will never see the light of day. It seems to me expedited procedures are a key part to a workable and effective review process. I would hope that you would keep that in your bill.

A criticism that I have heard voiced from time to time is that the legislative veto procedure would impose some kind of undue large workload on the Congress, because of the volume of regulations issued. I think I need to say what you have heard me say before: Maybe that is what the Congress needs to do for a while to look at what is happening in these agencies and to really buckle down. We all too often want to pay attention to the new laws that are being considered and not look at the effects the old laws are having on our constituents.

But having said that, you as the key sponsor of S. 1145, I think, have responded to these criticisms. You have provided for different kinds of review procedures with respect to major and nonmajor rules. I think that this is good. I do not think that the burden on Congress will be all that much and the procedure would permit the needed regulations to take effect in a timely way.

I think I ought to mention that your bill responds to some of the procedural problems that Congress encountered in the past, when we did exercise a veto of agency rules, particularly with respect to some FTC rules. These procedural stumbling blocks have been removed in this legislation. You have smoothed out these problems. What I am talking about is at what point a discharge motion can be filed, signatures can be solicited, and a lot of procedural issues like these. I want to commend you for that.

But needless to say, I want to add that there is a need for comprehensive regulatory reform as well. That is not included here, but we do need to address that as well at some later time.

Congressman Trent Lott has introduced legislation that requires regulatory analyses of major rules, including alternatives that have been considered, periodic review of existing regulations, notice and comment procedures, regulatory agenda, and so forth. Of course, we should continue working for the enactment of these kinds of regulatory reforms as well.

So in conclusion, Mr. Chairman, thank you again for permitting me to come over and again express my support for what you are trying to do. There is continued need for a comprehensive legislative review device in order to oversee the rulemaking activities of these various agencies. If we are to see any action, we are all going to have to get together to see if we can get something done this Congress, and achieve a consensus on this issue. I commend you for your efforts and your initiative and pledge to you that I will continue working with you to achieve the goal of passage of this legislation.

Thank you.

[Statement follows:]

Prepared Statement of Representative James T. Broyhill

I WOULD INITIALLY LIKE TO THANK THE CHAIRMAN AND THE MEMBERS OF THE SUBCOMMITTEE FOR THE OPPORTUNITY TO TESTIFY THIS AFTERNOON ON S. 1145, THE RULEMAKING PROCEDURES REFORM ACT OF 1985. IT IS A PLEASURE TO BE HERE.

THE SPONSORS OF THE RULEMAKING PROCEDURES REFORM ACT OF 1985 SHOULD BE COMMENDED FOR THEIR FORESIGHT AND PERSEVERANCE IN CRAFTING THIS PIECE OF LEGISLATION. DESPITE THE UNITED STATES SUPREME COURT'S DECISION IN IMMIGRATION AND NATURALIZATION SERVICE v CHADHA, FINDING THE USE OF LEGISLATIVE VETO TO BE UNCONSTITUTIONAL, THE NEED FOR A COMPREHENSIVE CONGRESSIONAL REVIEW PROCEDURE NOT ONLY PERSISTS, BUT CONTINUES TO GROW.

AS THE FEDERAL BUREAUCRACY CONTINUES TO EXPAND, SO DOES THE NUMBER AND COMPLEXITY OF FEDERAL REGULATIONS. MANY OF THESE REGULATIONS IMPOSE ENORMOUS COSTS ON THE ECONOMY, BUSINESS, AND CONSUMERS ALIKE. UNNECESSARY AND DUPLICATIVE REGULATIONS STIFLE OUR NATION'S GROWTH AND ABILITY TO COMPETE IN WORLD MARKETS. AT A TIME OF RISING IMPORTS INTO THIS NATION, ILL-ADVISED AND UNNECESSARY REGULATIONS HAMPER OUR COMPETITIVE POSITION AND AGGREVATE OUR TRADE DEFICIT. OFTEN THESE REGULATIONS WILL REACH INTO MATTERS OF CONCERN TO THE STATES, AND EVEN OVERRIDE OR PREEMPT STATE STATUTES.

REGULATIONS ISSUED BY EXECUTIVE AND INDEPENDENT AGENCIES HAVE THE FULL FORCE AND EFFECT OF LAW. CONGRESS HAS DELEGATED THIS BROAD LAWMAKING FUNCTION TO THESE ENTITIES WITH THE HOPE THAT THE REGULATIONS THEY PROMULGATE WILL COMPORT WITH CONGRESSIONAL INTENT AND UNDERLYING POLICY. UNFORTUNATELY, OUR HOPE IS NOT ALWAYS FULFILLED.

THE LEGISLATIVE VETO DEVICE ORIGINALLY WAS DESIGNED TO ENSURE THAT THESE REGULATIONS WOULD NOT TAKE EFFECT IF THEY WERE INCONSISTENT WITH LEGISLATIVE INTENT, UNNECESSARY, OR OTHERWISE ILL-ADVISED. LEGISLATIVE VETO ENABLED CONGRESS TO CHECK THE EXERCISE OF THE UNBRIDLED AUTHORITY OF REGULATORY AGENCIES. IT WAS AN EFFECTIVE TOOL TO ENSURE AGENCY ACCOUNTABILITY AND RESPONSIVENESS TO CONGRESS.

IT IS CRITICAL THEN FOR CONGRESS TO FILL THE VOID THAT WAS LEFT BY THE SUPREME COURT'S DECISION, AND TO RESUME ITS APPROPRIATE ROLE OF OVERSEEING THE REGULATORY ACTIVITIES OF THE AGENCIES. S. 1145 DOES PRECISELY THAT.

THE RULEMAKING PROCEDURES REFORM ACT OF 1985 CONTAINS A LEGISLATIVE REVIEW PROCEDURE FOR REGULATIONS ISSUED BY AGENCIES. THIS REVIEW DEVICE USES A JOINT RESOLUTION OF DISAPPROVAL WHICH, BY DEFINITION, WOULD HAVE TO PASS BOTH HOUSES OF CONGRESS AND BE PRESENTED TO THE PRESIDENT FOR SIGNATURE. SINCE IT COMPLIES WITH THE BICAMERAL AND PRESENTMENT REQUIREMENTS OF THE CONSTIUTION, I BELIEVE IT WILL PASS CONSTITUTIONAL MUSTER.

I SHOULD NOTE THAT I PREFER A REVIEW PROCESS WHICH "APPROVES" RULES, RATHER THAN DISAPPROVES THEM. CONGRESSMAN LOTT'S BILL IN THE HOUSE, H.R.1339, THE REGULATORY OVERSIGHT AND CONTROL ACT OF 1985, OF WHICH I AM A COSPONSOR, CONTAINS SUCH A REVIEW MECHANISM. SPECIFICALLY, IT PROVIDES THAT "MAJOR" RULES, WHICH ARE THOSE HAVING AN ECONOMIC IMPACT OF $100 MILLION ANNUALLY, COULD NOT TAKE EFFECT UNTIL THEY ARE EXPRESSLY APPROVED BY CONGRESS. ALL OTHER RULES COULD TAKE EFFECT WITHOUT CONGRESSIONAL INVOLVEMENT, UNLESS CONGRESS INTERCEDES AND DISAPPROVES THEM.

WHILE I BELIEVE THAT AN APPROVAL PROCESS IS A MORE APPROPRIATE ROLE FOR CONGRESS TO PLAY, I RECOGNIZE THAT A CONSENSUS IN CONGRESS MUST BE ACHIEVED IN ORDER TO SUCCESSFULLY OBTAIN A LEGISLATIVE REVIEW PROCEDURE TO APPLY TO AGENCY RULEMAKING ACTIVITIES. IF, IN ORDER TO ACHIEVE SUCH A CONSENSUS, THE CONGRESS EMBRACES A DISAPPROVAL MECHANISM, IT IS ESSENTIAL THAT IT CONTAIN PROCEDURES TO ENSURE THE REGULATIONS' TIMELY CONSIDERATION. EXPEDITED PROCEDURES, AS THEY ARE COMMONLY CALLED, ARE PIVOTAL TO A WORKABLE AND EFFICIENT REVIEW PROCESS. THESE PROCEDURES WILL ASSURE THAT THE COMMITTEE WITH JURISDICTION WILL CONDUCT HEARINGS AND WILL CONSIDER THE RULE IN A TIMELY AND APPROPRIATE MANNER. THEY WILL ALSO HELP TO ENSURE THAT BOTH HOUSES WILL DEBATE AND VOTE ON THE RULE.

WITHOUT THESE PROCEDURES, THERE IS NO GUARANTEE THAT THE RULE WILL BE GIVEN PROMPT AND FAIR CONSIDERATION. QUITE SIMPLY, EXPEDITED PROCEDURES ENSURE THAT THE RULE WILL BE REVIEWED IN A TIMELY MANNER, BEFORE IT CAN TAKE THE FORCE AND EFFECT OF LAW. TO THE PARTICULAR COMMUNITY THE RULE WILL REGULATE, EXPEDITED PROCEDURES LEND CERTAINTY AND PREDICTABILITY, NECESSARY TO EFFECTIVE BUSINESS PLANNING. THE RULEMAKING PROCEDURES REFORM ACT OF 1985 CONTAINS EXPEDITED PROCEDURES AS PART OF THE DISAPPROVAL REVIEW PROCESS AND THUS MEETS THIS FUNDAMENTAL CONCERN.

SOME CRITICISM HAS BEEN VOICED THAT A COMPREHENSIVE LEGISLATIVE VETO PROCEDURE WHICH APPLIES TO ALL RULEMAKING ACTIVITES WILL IMPOSE A LARGE WORKLOAD ON CONGRESS, GIVEN THE VOLUME OF REGULATIONS ISSUED. IN RESPONSE, THE DESIGNERS OF S. 1145 WISELY PROVIDED FOR DIFFERENT REVIEW PROCEDURES TO GOVERN "MAJOR" AND "NON-MAJOR" RULES. THOSE MAJOR RULES, WHICH ARE DEFINED AS HAVING A SUBSTANTIAL ECONOMIC COST AS IN H.R. 1339, WOULD BE REVIEWED FOR A PERIOD OF 90 DAYS. ALL OTHER RULES WOULD BE SUBJECT TO AN ABBREVIATED REVIEW PERIOD OF 45 DAYS, IN ORDER TO AVOID UNNECESSARY DELAY IN THE EFFECTIVENESS OF RULES THAT ARE NONCONTROVERSIAL AND RELATIVELY INSIGNIFICANT IN IMPACT. THE BURDEN WOULD BE ON CONGRESS TO ACT, AND FAILING TO DO SO, WOULD PERMIT THE REGULATION AT ISSUE TO TAKE EFFECT.

THE RULEMAKING PROCEDURES REFORM ACT OF 1985 STRIKES A BALANCE BETWEEN THESE TWO COMPETING CONCERNS. IT MINIMIZES THE IMPACT ON THE CONGRESSIONAL WORKLOAD, WHILE IT ALSO PRESERVES THE PROPER ROLE OF THE LEGISLATIVE BRANCH TO REVIEW THOSE REGULATIONS WHICH HAVE A SUBSTANTIAL IMPACT ON THE ECONOMY AND THE CONSUMING PUBLIC.

TURNING FOR A MOMENT TO SOME OF THE SPECIFIC PROVISIONS OF THIS LEGISLATION, I WOULD NOTE THAT IT SEEKS TO RESPOND TO SOME OF THE PROCEDURAL PROBLEMS THE CONGRESS ENCOUNTERED IN THE VETO OF A RULE ISSUED BY THE FEDERAL TRADE COMMISSION. PROCEDURAL "STUMBLING BLOCKS" HAVE BEEN REMOVED IN THE LEGISLATION TO ENSURE A SMOOTH REVIEW PROCESS, INCLUDING:

- SPECIFYING AT WHAT POINT A DISCHARGE MOTION CAN BE FILED AND SIGNATURES CAN BE SOLICITED,
- SPECIFYING THE PROCEDURES TO GOVERN SITUATIONS WHEN DISAPPROVAL RESOLUTIONS CROSS BETWEEN HOUSES.
- GIVING AN AGENCY THE DISCRETION TO RESUBMIT A RULE FOR REVIEW, WHEN THE PRIOR REVIEW PERIOD WAS INTERRUPTED BY AN ADJOURNMENT SINE DIE AND CONGRESSIONAL CONSIDERATION, ALTHOUGH INCOMPLETE, SIGNALED DISSATISFACTION WITH THE RULE AT ISSUE.

THESE PROVISIONS HAVE BEEN WISELY INCLUDED IN S. 1145 AND WILL HELP TO FURTHER FUTURE REVIEW OF RULES BY, AMONG OTHER THINGS, AVOIDING DUPLICATIVE CONSIDERATION BY CONGRESS.

WHILE MY COMMENTS THIS AFTERNOON HAVE FOCUSED ON THE DESIRABILITY OF A BROAD LEGISLATIVE REVIEW DEVICE FOR FEDERAL REGULATIONS, THE NEED FOR COMPREHENSIVE REGULATORY REFORM STILL EXISTS. IT IS WELL RECOGNIZED THAT THE REFORM OF INTERNAL RULEMAKING PROCEDURES WILL HELP TO IMPROVE THE WISDOM AND FAIRNESS OF THE REGULATORY END PRODUCT. CONGRESSMAN LOTT'S BILL CONTAINS NUMEROUS PROVISIONS TOWARD THIS END. UNDER THE LOTT BILL, H.R. 1339, AGENCIES WOULD BE REQUIRED TO CONDUCT REGULATORY ANALYSES OF MAJOR RULES, INCLUDING ALTERNATIVES THAT WERE CONSIDERED. PERIODIC REVIEW OF EXISTING REGULATIONS WOULD ALSO HAVE TO BE PERFORMED.

THE RULEMAKING PROCEDURES REFORM ACT OF 1985, S. 1145, INCLUDES CHANGES TO SECTION 553 OF THE ADMINISTRATIVE PROCEDURES ACT, WHICH SETS OUT PROCEDURES FOR "NOTICE AND COMMENT" RULEMAKING. THE LEGISLATION WOULD GIVE INTERESTED PARTIES GREATER OPPORTUNITY TO PARTICIPATE AND COMMENT IN THE RULEMAKING PROCEEDING. ANOTHER PROVISION WOULD REQUIRE AGENCIES TO PREPARE SEMIANNUAL REGULATORY AGENDAS, LISTING AREAS IN WHICH THEY INTEND TO PROPOSE RULES.

WHILE THE REFORMS CONTEMPLATED BY S. 1145 ARE NOT AS BROAD AS THOSE IN H.R. 1339, THEY ARE CERTAINLY AN APPROPRIATE STARTING POINT. IN THE CONTEXT OF THE FEDERAL TRADE COMMISSION, HOWEVER, THESE CHANGES MAY NOT BE NECESSARY, GIVEN THE COMPREHENSIVE RULEMAKING REFORMS THAT WERE ADOPTED IN THE MAGNUSON-MOSS WARRANTY ACT AND THE FEDERAL TRADE COMMISSION IMPROVEMENT ACT OF 1980.

IN CONCLUSION, MR. CHAIRMAN, THE NEED FOR A COMPREHENSIVE LEGISLATIVE REVIEW DEVICE TO OVERSEE THE REGULATORY ACTIVITIES OF THE VARIOUS AGENCIES NOT ONLY PERSISTS, BUT HAS BROADENED WITH THE PERVASIVENESS OF FEDERAL REGULATION. IF WE ARE TO REALIZE THIS GOAL, THE PROPONENTS OF LEGISLATIVE VETO MUST WORK TO ACHIEVE A CONSENSUS ON THIS ISSUE. I COMMEND YOU FOR YOUR EFFORT AND INITIATIVE IN THIS AREA.

Senator GRASSLEY. Thank you very much.

Let me start by alluding to your statement of personal preference for the positive approval of regulations and rules as opposed to the route we take here and explain for the benefit of everybody the winds are against us form an approval approach and in order to unite legislative veto forces in the Senate, Senator Levin and I got together and agreed on the approach before us today. So, like you, if I had my druthers, it would be something constitutional and more aggressive than what this approach is. But as a practical matter this is where we are today.

In your written statement, you had some comments related to the revision of the notice and comment procedures of S. 1145, and we appreciate that concern. Those same revisions do not appear in the FTC veto amendments that we will be putting forth. You had, Congressman, considerable experience with the process that we went through in disapproving the used car rules. Are there any problems you see with this proposal as it is written? In other words, have we addressed the potential procedural problems relating to congressional consideration of these rules?

Mr. BROYHILL. Yes, I think we have. We have gone over this with some care. For example, in the old legislative veto procedure which I had some hand in helping to write, as you will recall in the conference between the House and the Senate, we encountered an unfortunate procedural problem where the disapproval resolutions crossed between the Houses. A question arose as to whether resolutions should go back to the committees again, giving some people a chance to tieup these disapproval resolutions.

I think that you have answered that problem. Also, the question is often asked whether or not the agency would have an opportunity to resubmit an amended rule. That is would they have to go through the rulemaking procedure again? Your bill has answered that. I think that these provisions have been wisely included in your bill. They help further not only the future review of the rules, but also avoid duplicative consideration by Congress.

Senator GRASSLEY. I hope you agree with my feeling on the importance of adding the legislative veto provision to the FTC authorization bill. I would like to have you comment on it, if you do.

Mr. BROYHILL. We included a legislative review and veto procedure to the FTC authorization bill when it was considered in the Energy and Commerce Committee a few weeks ago. That amendment, however, did not contain expedited procedures. The reason that it did not is that under the rules of the House we do not have jurisdiction over the rules of the House, but rather that is the jurisdiction of the Rules Committee, We were not able under the rules to include that in our proposal. Now, the whole bill is pending before the House Rules Committee. We will, of course, discuss that at that time. Hopefully, we can get a bill out of the House that would contain expedited procedures, but that remains to be seen.

Senator GRASSLEY. Do you see any constitutional problems with S. 1145 particularly regarding the appropriations section of the bill?

Mr. BROYHILL. I must confess I have not had the opportunity to address that particular part of it perhaps as much as I should have. I have listened with a great deal of interest to the colloquy that you have had this afternoon with Senator Levin. I am not sure what kind of problems this may cause us on the House side to get a bill through. I think that perhaps my views on this would be in agreement with you and Senator Levin, but if it is going to cause a problem on the House side, I would be willing to give it up. That is my political view at this time.

I would certainly agree with you that it would be a welcome addition if we could get it through. But if it does cause a great deal of opposition by members of the Appropriations Committee on the House side, it may be that we would have to give on that part of it. I am being very frank and open with you here.

Senator **Grassley**. Sure, and that is what we want. I have no further questions. I appreciate very much your participating, and particularly for your support of whatever we can get done from a practical standpoint.

Mr. **Broyhill**. Thank you. I appreciate it.

Senator **Grassley**. Thank you.

I am going to take a 5-minute recess here.

[Short recess.]

Senator **Grassley**. I want to thank the witnesses for allowing me a 5-minute break.

Now we turn to our next witness. I have the pleasure of recognizing James Spears. He is representing the Department of Justice, and serves as Acting Assistant Attorney General in the Office of Legal Policy.

So with that, and my personal thank you for a few instances in which you have come to my office to brief me on things and to help me, and to tell you that I very much appreciate that, I welcome you here in another capacity to testify for the Department.

Thank you.

STATEMENT OF JAMES M. SPEARS, ACTING ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL POLICY, DEPARTMENT OF JUSTICE

Mr. **Spears**. Mr. Chairman, thank you so much.

I deeply appreciate the opportunity to appear before you today to give the views of the Department of Justice on the expanded congressional review of agency rulemaking proposed by Senate bill 1145, the Rulemaking Procedures Reform Act of 1985.

With your permission, Mr. Chairman, I would like to submit my full statement for the record and limit my oral testimony to a summary of our principal comments on this legislation.

At the outset, Mr. Chairman, I want to underscore the administration's strong commitment to regulatory reform. More than any prior administration, we have directly confronted both the procedural and substantive aspects of regulatory reform. We appreciate congressional interest in this matter, and we certainly appreciate your leadership and the leadership of other Members of both the Senate and the House in terms of trying to assist in developing some sort of procedures to ensure that regulatory reform does take place.

Procedurally, through Executive Orders 12291 and 12498, President Reagan has put into place a system of Presidential oversight of agency rulemaking which is unprecedented. We have imposed rulemaking standards on executive branch agencies to the extent permitted by law. For example, agencies must now prepare for major rules a regulatory impact analysis which includes cost benefit analysis. Substantively, we have reduced regulatory burdens in many areas, eliminating and revising many existing rules and reducing the number of new rules.

We have made considerable progress on regulatory reform, but we certainly still have far to go. The Attorney General has expressed to me his personal commitment to working to achieve meaningful regulatory reform. He and the rest of the administration look forward to working with the members of this subcommittee and with you Mr. Chairman and other Members of Congress toward the goals that we share.

On the merits of Senate bill 1145, we should be mindful of the concerns that prompted consideration of the legislative veto device initially. Before *Chadha,* these concerns were to a large extent obscured by constitutional considerations. With the constitutional debate behind, we believe that the legislative and executive branches can now focus on these underlying concerns and on whether there are steps that should be taken to improve the efficiency and public accountability of Federal agencies.

Let me start with the bill itself, Senator. The administration's threshold concern is that across-the-board regulatory reform is such an important matter that it should be addressed in a freestanding statute, debated and voted upon fully on the merits. This means first of all that any comprehensive regulatory reform legislation should be considered separately as one law, and not as an amendment to some other piece of legislation such as an authorization or appropriations bill. Therefore, the Department of Justice, would strongly oppose any effort to attach S. 1145 to the authorization bill for the Federal Trade Commission.

The central importance of regulatory reform also requires that congressional action concerning specific agency rules should be taken in freestanding legislation, and not hidden away in an appropriations bill or some other rider. Thus, we would oppose a provision such as the proposed section 807 of S. 1145, that would encourage last-minute appropriations riders disapproving agency rules.

Section 807 would amend the congressional rules to provide that, as soon as Congress passes a joint resolution disapproving a rule, and before presentment to the President, an appropriations bill would be subject to a point of order if it does not forbid the agency to spend money to enforce the rule. Not only would such a provision complicate the already too complicated appropriations process, but it would also burden the review of an agency rulemaking action with the complex and truly irrelevant issues surrounding an appropriations bill. Neither Congress nor the President—who would be compelled to veto an appropriations bill rather than just a bill limited to the agency rule in question—should be forced to conduct substantive regulatory rulemaking in such a fashion.

We note with some concern that the point of order authorized under section 807 would become available before the disapproval resolution is presented for Presidential action. Section 807 could therefore be construed as an attempt to circumvent the presentment clause, the requirement to present legislation to the President.

It should be recognized that the President's review of a congressional determination on an agency rule should not be prejudiced by premature congressional action and a mechanical linking of the rule to the appropriations process. We feel quite strongly that any enforcement procedure must not come into play until the legislative process on the agency rule—of which Presidential action is obviously a major component—has been completed.

While the joint resolution of disapproval mechanism proposed in Senate bill 1145 is constitutional, we would question whether such an approach comports with the traditional notions of legislative authority established by our Constitution and reflected in almost 200 years of constitutional history. While the framers recognized the need to allow the legislative branch to periodically revisit decisions and policies established by previous legislative action, the mechanism chosen was the legislative process itself.

Legislative decisions do not become sacrosanct once they have been committed to law; they may be revised, modified, or repealed by new legislation. However, nowhere did the framers suggest that Congress should reserve to itself an opportunity and a power to direct the implementation of those decisions on a continuing basis through a veto power over executive actions. Rather, the framers envisioned that Congress would make laws with reasonable specificity, reflecting policy judgments and decisions that would guide the executive in execution of those laws; and through its ability to legislate, Congress could subsequently expand, modify, or repeal enactments that might become a source of dissatisfaction.

Under the system that is established under Executive Orders 12291 and 12498, the President through the Office of Management and Budget maintains considerable oversight over agency rulemaking. These orders ensure that agencies carefully scrutinize the legal and factual basis for major rules, in order to maximize social benefits and minimize costs. Additionally, they ensure a consistent Administration-wide approach to the policies for which the executive branch is responsible. Once the agency has performed the regulatory impact analysis required by Executive Order 12291 and published the rule in the Federal Register, Congress has had the time to inform itself about the rule—its impacts, its costs, and its benefits—and has the ability to legislate, if necessary.

Of course, making the political choices that must be made in order to give clear, precise policy guidance to administrative agencies is not easy, and we recognize that. But in the past, the legislative veto mechanism has often been viewed as an attractive alternative to making these difficult choices initially, allowing Congress to pass less than clear statutes, and leaving Congress the authority to veto objectionable agency decisions later. We think it is relatively clear that the legislative veto mechanism, in addition to its constitutional infirmities, may even have encouraged the passage of vague and overly broad delegations of authority. It appears that the widespread use of a regulatory veto mechanism could be similarly counterproductive.

Additionally, we do have serious concerns about the workability of the Senate bill 1145 congressional review mechanism. It would impose rigid timetables upon Congress and its committees to introduce, debate, report upon, and enact literally thousands of resolutions each year. The cumulative burden of such paperwork could overwhelm committee staffs and raise serious possibilities for stalemate and delay. Ironically, the passage of this legislation, which is intended to curb the discretion of the executive bureaucracy, would ultimately result in a much larger legislative bureaucracy. The extent to which Senators and Congressmen are currently removed from key legislative decisions could increase, and the legislative bureaucracy would be more difficult to manage.

Assuming that Congress could overcome these obstacles and meet its self-imposed deadlines, we wonder about the quality of decisions that would result from such a process. Would only 2 hours of debate give Congress adequate opportunity to explore and evaluate the merits of a complex rule? For example, regulations under the Clean Air Act were promulgated only after years of agency proceedings. Additionally, how would such a process mesh with the procedural requirements and deliberative processes prescribed by the Administrative Procedures Act?

In short, Senate bill 1145 might create considerable potential for injecting delay, uncertainty and additional paperwork into the administrative process and causing difficult problems in interpretation and judicial review of agency rulemaking decisions. The potential for creating conflicting legislative direction on an issue is very real.

We should therefore consider whether this congressional review procedure would offer discernible improvement over the process currently available for reviewing agency decisionmaking.

My final observation on Senate bill 1145, Senator, is to identify what I perceive to be the fundamental problem that the bill does not address. The bill fails to ameliorate the basic difficulty confronting agencies that are delegated rulemaking authority by Congress, and that is the statutory criteria under which such authority is granted. In all too many cases, it is not well-defined, is too broad, and provides only limited guidance for the agencies in the exercise of their discretion. We agree that some agencies on occasion have acted far beyond the limits of their authority. But we believe that the roots of agency activism can often lie in the vaguely defined objectives and standards found in many regulatory statutes. As the full Senate Judiciary Committee acknowledged in its report to the 97th Congress on Senate bill 1080, Congress has frequently asked the agencies to make the basic, vitally important policy choices that should be more properly committed to the legislative branch.

To the extent that statutes give agencies clear and precise guidance, our jobs would all be easier. The executive branch would have a clearer view of its responsibility to execute the laws and therefore be better able to keep administrative agencies politically accountable. Congress would not be faced with agency rulemaking that distorts or exceeds what Congress intended in the statute. Finally, the courts would be better able to determine whether a particular agency action lies within the scope intended by Congress when it delegated the authority in question.

Most importantly, this process would be more fully in accord with the lawmaking and law-executing processes envisoned by the framers of our Constitution, processes that were intended to be political and subject to democratic controls.

Because my testimony has focused on several substantive problems that the Department has identified in the proposal, the tone of this presentation has been negative. I do not want to leave the subcommittee with that impression. I want to reiterate the administration's commitment to regulatory reform and to working closely with the Congress to determine whether regulatory reform can be furthered by legislation concerning the rulemaking process.

We are convinced that regulatory reform should include at least the following: Easing inappropriate regulatory burdens through cost/benefit analysis and otherwise; Presidential oversight over agency rulemaking, and congressional attention to making the hard policy choices required by disciplined lawmaking and avoiding overly broad delegations of rulemaking authority. What we all must consider now is whether expanded congressional review of rulemaking would also contribute to that comprehensive approach to regulatory reform.

That does conclude my prepared statement, Mr. Chairman. I would be happy to answer any questions that you may have.

[Statement follows:]

PREPARED STATEMENT OF JAMES M. SPEARS

Mr. Chairman and Members of the Subcommittee:

I appreciate the opportunity to appear before you today to give the views of the Department of Justice on the expanded congressional review of agency rulemaking proposed by S. 1145, the Rulemaking Procedures Reform Act of 1985.

At the outset, Mr. Chairman, I want to underscore this Administration's strong commitment to regulatory reform. More than any prior administration, I would submit, we have directly confronted both the procedural and substantive aspects of regulatory reform. Procedurally, through Executive Orders 12291 and 12498, President Reagan has put into place a system of presidential oversight of agency rulemaking. We have imposed rulemaking standards on executive branch agencies, to the extent permitted by law; for example, agencies must prepare for major rules a regulatory impact analysis, which includes cost/benefit analysis. Substantively, we have reduced regulatory burdens in many areas, eliminating and revising many existing rules and reducing the number of new rules.

We have made considerable progress on regulatory reform, but we certainly still have far to go. The focus of these hearings must be on whether proposals for increased congressional oversight of rulemaking would advance true regulatory reform. In light of the Supreme Court's decision in INS v. Chadha, 462 U.S. 919 (1983), holding unconstitutional the "legislative veto," the question we must all address -- and I stress we, since this Administration is committed to working closely with Congress in this area -- is whether to enact into law an across-the-board "regulatory veto" of the sort proposed in S. 1145 and other bills. Such a mechanism would attempt to do what the legislative veto did, but in a constitutional manner.

General Considerations

The Administration's threshold concern is that across-the-board regulatory reform is such an important matter that it should be addressed in a free-standing statute, debated and voted upon fully on the merits. This means first of all that any comprehensive regulatory reform legislation should be considered separately as one law and not as an amendment to some other legislation, such as an authorization or appropriations bill. We therefore would strongly oppose any effort to attach S. 1145 to the authorization bill for the Federal Trade Commission.

The central importance of regulatory reform also requires that congressional action concerning specific agency rules should be taken in free-standing legislation, not hidden away in an appropriations or other rider. Thus, we oppose provisions, such as proposed section 807 of S. 1145, that would encourage last-minute appropriations riders disapproving agency rules.

Section 807 would amend the congressional rules to provide that as soon as Congress passes a joint resolution disapproving a rule (and before presentment to the President), an appropriations bill will be subject to a point of order if it does not forbid the agency to spend money to enforce the rule. Not only would such a provision complicate the already too complicated appropriations process, but it also would burden the review of an agency rulemaking action with the complex and truly irrelevant issues surrounding an appropriations bill. Neither Congress nor the President -- who would be compelled to veto an appropriations bill rather than just a bill limited to the agency rule in question -- should be forced to conduct substantive regulatory reform in such a fashion.

I note with some concern that the point of order authorized under section 807 would become available before the disapproval resolution is presented for presidential action. Section 807 could be construed as an attempt to bypass the President. It must be recognized that the President's review of a congressional determination on an agency rule should not be prejudiced by premature congressional action and a mechanical linking of the rule to the appropriations process. We feel quite strongly that any "enforcement" procedure must not come into play until the legislative process on the agency rule -- of which presidential action is obviously a major component -- has been completed.

Having stressed that regulatory reform is so important that it must be addressed comprehensively and on its own merits, let me discuss generally the need for legislation in this area. The Attorney General has expressed to me his personal committment to working to achieve regulatory reform. He and the rest of the Administration look forward to working with members of this subcommittee and other members of Congress toward that end. We should address jointly many of the difficult concerns that encouraged resort to the legislative veto device. Before Chadha, those concerns were, to a large degree, obscured by constitutional considerations. With the constitutional debate behind us, we believe that the legislative and executive branches now can focus on those underlying concerns, and on whether there are steps that should be taken to improve the efficiency and public accountability of the federal government, consistent with the "single, finely wrought and exhaustively considered, procedure for making laws that is embodied in the Constitution." INS v. Chadha, 462 U.S. at 951.

We can fully appreciate why rulemaking by federal agencies is often perceived as a form of "lawmaking" that requires a more extensive congressional review role than the usual congressional oversight of other types of executive action. The perception of lessened accountability for government decisions made through rulemaking is exacerbated when the statute authorizing agency rulemaking sets standards that are broad and open-ended. While broad statutory language is occasionally necessary to permit agency discretion to respond to complex regulatory problems, or to fashion a political compromise leading to the passage of legislation, the agency must then fill the interstices left by Congress when it passed the statutory scheme. Such a system understandably sometimes will provoke considerable controversy over whether the agency has reached the correct conclusions regarding legislative intent. Perhaps even more importantly, the concern with regulatory reform stems from a sense that the federal agencies may be "out of control," exercising considerable authority over the lives of individuals and the conduct of business, without being accountable for how such authority is exercised. 1/

The Administration has sought to provide that accountability through presidential oversight under Executive Orders 12291 and 12498. S. 1145 seeks to provide even more accountability through increased congressional oversight.

Congressional Review Under S. 1145

S. 1145's core provision is proposed section 804, which would require that agency regulations could not become effective until they had been submitted to Congress for defined layover periods. "Major" rules (annual effect on economy of $100 million or more, or otherwise designated major by the agency, the President or OMB) would become effective unless a joint resolution disapproving the rule is enacted into law (i.e., passed by both Houses and then signed by the President or his veto overridden) within 90 days of submission to Congress. "Nonmajor" rules would only have to lay before Congress for 45 days before becoming effective. Rules could become effective earlier if a disapproval resolution is defeated by one House of Congress before the waiting period expires. "Emergency rules" would be exempt from congressional review, but would automatically expire 120 days after promulgation. Section 805 would amend the Senate and House rules to provide a "fast track" (expedited consideration) for disapproval resolutions. In addition, as discussed above, section 807 would establish a parliamentary device designed to facilitate passage of appropriations riders prohibiting agency enforcement of a rule disapproved by Congress (but not necessarily by the President).

While the mechanism proposed by S. 1145 could be reworked to technically satisfy minimum constitutional

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1/ See Sierra Club v. Costle, 657 F.2d 298, 405-06 (D.C. Cir. 1981).

requirements for legislation, 2/ we question whether such an approach comports with the traditional notions of legislative

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2/ We have constitutional and legal concerns about proposed § 804(d) and § 804(b) of S. 1145. First, we believe that proposed § 804(d) constitutes an unconstitutional legislative veto device. Under proposed § 804(c), "major rules" would take effect at the expiration of 90 days of continuous session, and "nonmajor" rules would take effect at the end of 45 days of continuous session, if no joint resolution of disapproval is enacted into law during that period. Proposed section § 804(d) additionally provides, however, that such rules may take effect immediately upon either House's rejection of a joint resolution of disapproval (or, in the case of the Senate, after disposition of a motion to reconsider such a resolution). As a practical matter, § 804(d) would permit one House of Congress to speed up the effective date of a rule, by rejecting a resolution of disapproval prior to expiration of the required review period. In effect, the section would allow one House of Congress to "waive" the remainder of the statutorily required review period.

As we have previously stated on several occasions, we believe such "acceleration provisions" fall squarely within the Supreme Court's denunciation of legislative veto devices in Chadha. The Court settled that an action taken by one House of Congress with "the purpose and effect of altering the legal rights, duties and relations of persons . . . outside the legislative branch," is "essentially legislative in purpose and effect," 462 U.S. at 952, and therefore "requires action in conformity with the express procedures of the Constitution's prescription for legislative action: passage by a majority of both Houses and presentment to the President." Id. at 958. Because proposed § 804(d) conforms to neither aspect of the procedure for legislative action, it is unconstitutional and should be deleted from the bill.

Our concern about proposed § 804(b) is not that the provision contains an unconstitutional legislative veto device, but that the declaration that a final rule promulgated by an agency and filed with the Office of the Federal Register "shall be considered a recommendation of the agency to the Congress" is inconsistent with the congressional review scheme that would be established by this bill, and with the legal distinction between executive actions and proposals for legislation. We believe that final rules promulgated by agencies under this bill would continue to be, in a legal sense, final rules rather than mere "recommendations," and that this bill would function only to limit the rulemaker's authority to make rules legally effective.

Proposed § 804(b)'s characterization of agency final rules as mere "recommendations" disregards the well-settled legal distinction between a legislative proposal, such as a bill, and final executive action under legislatively delegated authority, such as a final rule promulgated by an executive agency. As the Supreme Court made clear in Chadha, "[e]xecutive action under legislatively delegated authority that might resemble 'legislative' action in some respects is not subject to the approval of both Houses of Congress and the President for the reason that the Constitution does not so require." 462 U.S. 919 n.16.

This distinction is particulary clear in this bill, because by the terms of the bill both major and nonmajor rules will have the force of law unless disapproved by joint

(Footnote Continued)

authority established by our Constitution and through almost 200 years of constitutional history. While the Framers recognized the need to allow the legislative branch to periodically revisit decisions and policies established by previous legislative action, the mechanism chosen was the legislative process itself. Legislative decisions do not become sacrosanct once they have been committed to law; they may be revised, modified or repealed by new legislation. However, nowhere did the Framers suggest that Congress should reserve to itself an opportunity and a power to redebate its prior decisions on a continuing basis through a veto power over executive actions such as implementing regulations. Rather, the Framers envisioned that Congress would make laws with reasonable specificity, reflecting policy judgments and decisions that would guide the Executive in execution of those laws; and through its ability to legislate, Congress could expand, modify or repeal enactments that might later become the source of dissatisfaction.

Of course, making the political choices that must be made in order to give clear, precise policy guidance to administrative agencies is not easy. In the past, the legislative veto mechanism has often been rationalized as an attractive substitute for making those difficult choices, by giving Congress leverage to pull back particular agency decisions and take another look, free of executive branch input or veto. Yet, we think it is relatively clear that the legislative veto mechanism, in addition

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(Footnote Continued)

resolution within the specified time period. In such cases, the United States Court of Appeals for the District of Columbia has declared that the contention that a final rule is

> a mere legislative proposal is easily refuted by comparing the status of the rule to that of a bill introduced in Congress. If neither house of Congress acts to approve a bill, the bill dies; but when neither house acts to disapprove an agency rule, the rule becomes law. Clearly the agency rule has some legal force that a proposed bill does not.

Consumer Energy Council of America v. FERC, 673 F.2d 425, 465 (D.C. Cir. 1982), summarily aff'd sub nom. Process Gas Consumers Group v. Consumers Energy Council of America, 103 S.Ct. 3556 (1983). We therefore, believe that proposed § 804(b) should be deleted from the bill.

to its constitutional infirmities, simply was not effective in checking agency abuses and in fact may have encouraged the passage of vague and overly-broad delegations of authority. Although there has not been any relevant experience with "regulatory veto" mechanisms, such as the one in S. 1145, substantial questions are presented as to whether widespread use of such mechanisms would be similarly counterproductive and would mask, rather than relieve, the fundamental problem of clearly articulating public policies in law. 3/

We have serious concerns about the workability of the S. 1145 congressional review mechanism. It would impose rigid timetables upon Congress and its committees to introduce, debate, report upon, and enact literally thousands of resolutions every year. The cumulative burden of such paperwork could overwhelm committee staffs, and raise serious possibilities for stalemate and delay. Ironically, passage of this legislation, which is intended to curb the discretion of executive branch bureaucrats, would ultimately result in a much larger legislative bureaucracy. The extent to which members of Congress are currently removed from key legislative decisions would be increased and the legislative bureaucracy would be difficult to manage.

Even assuming that Congress could overcome these obstacles and meet its self-imposed deadlines, we have serious questions about the quality of the decisions that could result from such a process. Would only two hours of debate, for example, give Congress adequate opportunity to explore and evaluate the merits of a complex major rule promulgated after years of agency proceedings pursuant to a statute, such as the Clean Air Act, that itself had been the product of years of congressional deliberation, not to mention the procedural

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3/ Indeed, the mechanism might exacerbate that problem in yet another way. A joint resolution disapproving an agency rule would not establish a substitute rule or change the underlying law. Its strictly negative nature would thus leave the agency in doubt as to what kind of rule to promulgate and, because of its unclear effect on the law underlying the rule, might create questions about the legal basis for future agency rulemaking on the subject.

deliberative process prescribed by the Administrative Procedure Act?

The Framers understood that to the extent Congress as a body were to become seriously involved in the process of reviewing the substance of every detailed and complex executive action, it would likely become hopelessly mired in details. As Thomas Jefferson wrote nearly two hundred years ago:

> Nothing is so embarrassing nor so mischievous in a great assembly as the details of execution. The smallest trifle of that kind occupies as long as the most important act of legislation, and takes place of everything else. Let any man recollect, or look over the files of Congress, he will observe the most important propositions hanging over from week to week and month to month, till the occasions have past them, and the thing never done. I have ever viewed the executive details as the greatest cause of evil to us, because they in fact place us as if we had no federal head, by diverting the attention of that head from great to small objects . . . .

11 T. Jefferson, The Papers of Thomas Jefferson 678 (J. Boyd, ed. 1955)(letter to E. Carrington, Aug. 4, 1787).

In short, S. 1145 might create considerable potential for injecting massive delay, uncertainty, and paperwork into the administrative process. 4/ It also may cause difficult problems of interpretation in judicial review of agency rulemaking decisions. We should therefore consider whether this congressional review procedure would offer any discernible improvement over the process currently available for reviewing agency rulemaking.

Under Executive Orders 12291 and 12498, the President, through the Office of Management and Budget, maintains

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4/ Another substantial problem stems from the bill's method for computing delayed effective dates of regulations. The periods of 45 days for nonmajor rules and 90 days for major rules would be based on days for "continuous session," which is defined to exclude all adjournments to a date certain of more than three days. Further, adjournment sine die would require resubmittal of a regulation pending at the time of that adjournment and the 45 or 90 day period could not begin again until Congress reconvened. Agencies that must issue regulations to conduct their day to day business would be constrained to invoke the emergency exception for many of their regulatory documents, just to avoid the potential months of delay under the continuous session provision.

considerable oversight over rulemaking by the non-independent executive branch agencies, both to ensure that the agencies scrutinize carefully the legal and factual bases for major rules in order that those rules maximize social benefits and minimize costs to the extent permitted by law, and to ensure a consistent, well-reasoned Administration-wide approach to policies for which the executive branch is responsible. Once the agency has done the regulatory impact analysis required by Executive Order 12291 for a major rule and published the rule in the Federal Register, Congress has time to inform itself about the rule, and legislate to block it, as it has done in the past in exceptional cases on an ad hoc basis -- e.g., the statutory overrides of the saccharin ban (P.L. 95-203) and the seatbelt-ignition interlock rule (P.L. 93-492).

Moreover, there is an ongoing informal dialogue between every federal agency and Congress. That dialogue serves both to inform Congress of the agency's plans and interpretations of its statutory authority, and to give the agencies information about congressional concerns and views. This process is supplemented by the considerable political influence that Congress can bring to bear on the agencies, through the authorization and appropriations process and through legislative hearings and inquiries.

My final observation on S. 1145 is to identify what I believe to be the fundamental problem that it does not address. The bill fails to ameliorate the basic difficulty confronting agencies that are delegated rulemaking authority: that the statutory criteria under which such authority is granted in all too many cases are not well-defined, are too broad, and provide only limited guidance to the agencies in the exercise of their discretion.

While we agree that some agencies on occasion have acted beyond the limits of their authority, we believe that the roots of agency activism can often lie in the vaguely-defined objectives and standards found in many regulatory statutes. Of course, general delegations of power to administrative agencies are inevitable, given the sophistication and complexity of the technical areas covered by many regulatory statutes and the institutional constraints upon the time and resources of Congress. However, as the full Senate Judiciary Committee acknowledged in its report in the 97th Congress on S. 1080, 5/ Congress has frequently asked the agencies to make the basic, vitally important policy choices that are more properly for the legislature to make.

To the extent that statutes give the agencies clear, precise guidance as to how and to what ends discretion should be exercised, all our jobs would be easier. The executive branch would have a clearer view of its responsibility to execute the laws, and therefore would be better able to keep administrative agencies politically accountable; Congress would not be faced with agency rulemaking that distorts or exceeds what Congress intended in the statute; and the courts would be better able to determine whether particular agency action lies within the scope intended by Congress when it delegated the authority in question. Most importantly, this process would be more fully in accord with the lawmaking and law-executing processes envisioned by the Framers of the Constitution, processes that were intended to be political and subject to democratic controls.

In this regard, I must repeat what I said earlier: an unfortunate side effect of S. 1145 is that, by providing Congress a "second look" at programs and policy, it would encourage even less precision in the legislative process than is currently reflected in the acts of Congress.

Before closing, let me highlight one area that a comprehensive regulatory reform legislative initiative might address: the accountability of the independent regulatory agencies and commissions, the so-called "fourth branch" of government that exists largely outside the day-to-day control of either the President or Congress.

Presidential Control Over Independent Regulatory Agencies

Central to the Supreme Court's analysis in Chadha is the well-founded proposition that the Constitution recognizes only three branches of the federal government -- legislative,

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5/ S. Rep. No. 284, 97th Cong., 1st Sess. 164 (1981).

executive, and judicial -- and that the respective spheres of power of those three branches are identifiable and distinct:

> Although not "hermetically" sealed from one another, the powers delegated to the three Branches are functionally identifiable. When any Branch acts, it is presumptively exercising the power the Constitution has delegated to it. When the Executive acts, it presumptively acts in an executive or administrative capacity as defined in Art. II. And when . . . Congress purports to act, it is presumptively acting within its assigned sphere. 462 U.S. at 951-952 (citations omitted).

As the Court recognized in Chadha, the fundamental intent of the tripartite scheme designed by the Framers was to ensure that each branch fulfills the functions for which it is best suited, and that each branch is accountable for performance of those functions. And, the Supreme Court reminded us, the division of powers among the three Branches was to assure

> as nearly as possible, that each Branch of government would confine itself to its assigned responsibility. The hydraulic pressure inherent within each of the separate branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted. Id. at 951.

It is difficult to reconcile this constitutional scheme with the reality of regulation by the mixed assortment of commissions, agencies, government or quasi-government corporations, authorities, institutions, and boards generally referred to as "independent" regulatory agencies. Historically, the premise underlying creation of such "independent" agencies was that some forms of regulation (primarily adjudication and investigation) "should be entrusted to nonpartisan 'experts' whose decisions are free from 'political' supervision by the President." H. Bruff, "Presidential Power and Administrative Rulemaking," 88 Yale L.J. 451, 480 (1979). Whatever its original validity, however, that premise now seems questionable.

Today, executive branch agencies that cannot be characterized as "independent" engage in rulemaking in a functionally indistinguishable fashion from the so-called "independents," and many of the responsibilities and functions of the independent agencies overlap considerably with responsibilities and functions placed by Congress in other executive branch agencies. In fact, Congress has recently seen fit to transfer to executive branch agencies some functions performed by these "independent" agencies. For example, Congress has transferred a number of functions exercised by the Civil Aeronautics Board with respect to foreign and domestic air transportation to the Department of Transportation and the U.S. Postal Service. Pub. L. No. 95-504, § 40(a), 92 Stat. 1744, 49 U.S.C. § 1551; Pub. L. No. 98-443, § 3(a), 98 Stat. 1703.

By and large, the independent agencies are not cohesive, centrally managed, or, most importantly from a constitutional standpoint, directly accountable in any effective way to the Congress or the President, those organs of government to whom the Constitution gave exclusive power to make and to execute the laws. In the wake of Chadha, it is appropriate to reexamine whether responsibility for administrative and regulatory execution and enforcement of our laws -- clearly executive branch functions -- should be vested in governmental entities that are not directly accountable to our elected President.

We believe that some of the energy being expended in seeking alternatives to legislative vetoes should be channeled into efforts to return lawmaking and law-executing authority to the political branches of the government, as intended so clearly by the Framers of the Constitution. As a beneficial byproduct, this process might well expose governmental authority that is not only lodged improperly in various politically unaccountable agencies, but is not even the proper business of the federal government. The primary objective, however, should be to reaffirm that in our system governmental power must be allocated in a manner that allows for direct political accountability in the spheres of lawmaking and law-executing.

Several of the regulatory reform bills that have been advanced in recent years would enhance the accountability of the independent agencies to the executive branch, at least with respect to the rulemaking functions of those agencies. Such bills as S. 1080 and H.R. 3939, 98th Congress, would include independent agencies and commissions within the definition of "agency", for the purposes of the bills. Unlike S. 1145, those bills would give the President the authority: to establish procedures for agency compliance with detailed provisions requiring a regulatory analysis for every "major rule;" to monitor, review and ensure agency implementation of such procedures; and to designate "major rules." The President would thus receive a measure of control over rulemaking by the independent agencies.

I do not mean to suggest that the Administration endorses any of the particular proposals that would provide for increased executive branch control over the rulemaking of these so-called independent agencies. Nonetheless, I believe the time has come -- in the context of regulatory reform -- to give very serious consideration to the problem of the unaccountability of the independent agencies, which after all execute the law and therefore functionally belong as a part of the executive branch.

Conclusion

Because my testimony has focused on several substantive problems that the Department has identified in the proposal, the tone of this presentation has been negative. I do not want to leave the subcommittee with that impression. I want to reiterate the Administration's commitment to regulatory reform and to working closely with Congress to determine whether regulatory reform can be furthered by legislation concerning the rulemaking process. We are convinced that regulatory reform should include at least the following: easing inappropriate regulatory burdens through cost/benefit analysis and otherwise; presidential oversight over agency rulemaking; and congressional attention to making the hard policy choices required by disciplined lawmaking and avoiding overly broad delegations of rulemaking authority. What we all must consider now is whether expanded congressional review of rulemaking would also contribute to that comprehensive approach to regulatory reform.

That concludes my prepared statement, Mr. Chairman. I would be happy to answer any questions you and other members of the subcommittee may have.

Senator GRASSLEY. Your position may not be totally negative, except toward everything we want on the congressional veto.

I do not suppose I would have expected anything different, and I do not say that about you, but just this Department or just this administration. I think it has been through nine Presidents so far, at least going back to the thirties, that there has not been a one single Justice Department that has endorsed the concept in the past, and frankly, I do not expect that we will ever see a Department that will do so in the future. It is a natural tendency on the part of the executive branch to expand its power to the maximum and resist strongly any efforts by Congress to recapture any of that power or restrict it, and that does not matter whether it is a Republican administration or a Democratic administration. The concept tends to be pretty much the same in every administration, that being, that we are not going to give up anything very willingly.

I guess what I feel so bad about in regard to this administration, is that when any bureaucracy captures an incoming administration, the policy continues year after year, and I refer to a statement that President Reagan made in a weekly column when he was a candidate for President in 1979. It was entitled, "Nailing the Regulators." It is ironic that the subject of the article happens to be the FTC legislative veto provision that Congressman Broyhill and Senator Levin previously referred to, and candidate Reagan vehemently supported. It is the same sort of thing that you now, according to your testimony, so vehemently oppose.

Candidate Reagan used the following words—and this was about 6 years ago—in which he said: "Funny—that sounds as if he means"—referring to his opponent then—"the regulators will have to be more sensitive to the mood of the people, just as Members of Congress are. Since bureaucrats are not elected, holding them more accountable than they have been sounds like a pretty good idea in this constitutional Republic of ours."

That was candidate Reagan. I would like to just for the record remind anybody who is a part of this administration, speaking out against the congressional veto, that the 1980 platform supported it, the Reagan transition team speaking for the President endorsed it, David Stockman endorsed the veto in his confirmation hearings as the Director of OMB, and then we had it reaffirmed in the 1984 Republican platform, when the legislative veto was endorsed, and it was specific in regard to responding to *Chadha*. It says, quote, "A constitutional procedure enabling Congress to properly oversee Federal regulations by reviewing and if necessary, overturning them." That was my 1984 Republican platform, our adminsitration's platform.

And yet, I am used to getting the sort of comments that you just made from the Justice Department. As far as I am concerned, the Department's opinion on whether legislative veto is good policy is irrelevant at this point, because that opinion has not varied in the last 5 years, and yet hundreds of veto provisions are in the law and will continue to be placed there.

My question to you is not whether this is an acceptable policy to the Department, but whether in your opinion, beyond the technical questions raised by section 804 (b) and (d), this approach is constitutional. If not, in light of *Chadha,* why not, and I would appreciate case cites supporting that opinion.

Mr. SPEARS. As I have noted in my written testimony, in the two subsections that you allude to there seem to be some problems in view of *Chadha*. As to the question of how the process moves along and whether one branch of the Congress can short-circuit that, I believe that that would require kind of a technical amendment, and we could overcome that kind of constitutional deficiency. That is laid out in one of the footnotes in my written testimony, and we would be happy to go into that.

The other question is one that we noted, too, and that is the extent to which the legislation purports to suggest that an agency action is not an executive action, but indeed, a presentment to Congress for approval. Again, I do not think that one could change the terminology and perhaps avoid that track. But again, I think that raises a question under *Chadha*, because the Supreme Court in its decision in *Chadha* essentially made the cutoff that legislative power is that which Congress elects to utilize; that which is delegated becomes executive power by that particular action. Again, I think some change in the terminology could overcome any potential constitutional problems there.

One final constitutional issue that would seem to be there, and again it goes to the language of *Chadha*, not particularly any other determination, is that the Supreme Court in *Chadha* seemed to be particularly concerned about the presentment clause, and any efforts to circumvent that. I think that by putting it in the appropriations process, there is a part of *Chadha* that recognizes that that is an impermissible activity. In my view, how that authority, if adopted by this Congress and signed into law, was utilized would answer that question.

A couple of final points, Senator, if I may. There is absolutely no question that we agree with Congressman Broyhill and with you, Mr. Chairman, and with Senators Levin and Boren and the other members of this body who are interested in making the executive branch more politically accountable. We have worked hard on that in our efforts at regulatory reform in the administration.

We agree that it should be made more accountable. This administration adopts the concept of a unitary executive. Agencies which are out there not subject to the control of elected officials are agencies which are out of control, and they should be made more responsive to the people. And that is one of the reasons why this administration espouses the concept of a unified executive.

The views that we have expressed as an administration have changed. *Chadha* has caused that to change, in many respects. We find that the section 807 mechanism, which is part and parcel of this bill—indeed, one of the principal portions of it, or concerns, and one of the principal ideas that Senator Levin has set forth—does contain some crosscutting policy issues for the administration, and I know that they are issues which you share concern about.

We support, for example, the line-item veto approach that Senator Mattingly has laid out in his legislation. That is a principle which has received some substantial support in this body, as well. And the extent to which section 807 becomes an automatic provision is the extent to which, all of a sudden, we would have more and more riders going into that appropriations process.

Senator **Grassley**. Those are policy questions, though, not constitutional questions.

Mr. **Spears**. Yes, sir, you are correct.

Senator **Grassley**. I guess I have to urge you to concentrate on the constitutional questions.

Mr. **Spears**. I am sorry.

Senator **Grassley**. Pre-*Chadha*, the opinion of the Department was that the vetoes not subject to Presidential approval or disapproval were unconstitutional because of the presentment clause. Now, you are not saying what we are doing today is unconstitutional?

Mr. **Spears**. I would say that there are some adjustments that would need to be made in light of *Chadha* to make the bill constitutional. I do not see that any of those adjustments would necessarily undercut what this group wants to do with this bill. Those are essentially, in my view, technical kinds of amendments.

Senator **Grassley**. Technical?

Mr. **Spears**. Yes, sir.

Senator **Grassley**. So as far as the real substantive things, then, you agree that we are following *Chadha*, because *Chadha* dealt with following a correct procedure, not with some sort of guaranteed outcome. So our bill does follow the constitutional procedures.

Mr. **Spears**. Yes, sir.

Senator **Grassley**. Thank you. I did interrupt you. I should give you a chance to finish whatever point you were trying to make when I brought up the point of policy.

Mr. **Spears**. Senator, I just wanted to thank you again for having us here. We look forward to working with you in whatever way we can. We appreciate your interest and leadership, and we will be working hard on our side of the street on regulatory reform, as well.

Senator **Grassley**. Let me reconsider, and maybe I should ask one more thing. This deals with the policy issue that you brought up. I would ask you to comment on the following observation made by Stu Eizenstat, who is going to be testifying, who, as everyone knows, was President Carter's Domestic Policy Advisor. I would like to quote from his testimony, and it is about a three- or four-sentence quote:

> Moreover, when an agency promulgates a rule, it is engaging in a legislative task, in effect, completing the details on the implementation of the policies Congress has established. Congress should have a significant role in the issuance of such regulations. The Grassley-Levin bill, which confines itself to the Congressional oversight of agency rules, strikes a reasonable balance in assuring appropriate legislative review without crossing the Constitutional barriers that *Chadha* erected.

Would you comment on that?

Mr. **Spears**. Yes, Senator.

Senator **Grassley**. I hope you can say you agree.

Mr. **Spears**. Well, sir, I have got to go by what the Supreme Court says the Constitution means, and what constitutes legislation and what does not. On a legal basis, once Congress has finished with an action and says, "These powers shall be delegated to the Federal Trade Commission and EPA," or whatever agency it elects, at that point in time, while there may still be substantive policy issues there which we would view as issues that should be resolved by Congress, at that point in time it ceases to be "legislative decision". Congress, by virtue of its delegation, turned that legislative decision into an executive decision, which can subsequently be pulled back by Congress or defined or limited by Congress by subsequent legislation.

So on a legal basis, it is not an ongoing question of legislation, according to the Supreme Court in *Chadha*. It becomes an Executive function.

Now, with respect to what I think Mr. Eizenstat was alluding to, and that is, the agencies are vested with too much discretion in certain instances and that legislative oversight is not sufficient in other instances, we would concur with that. To the extent to which this effort represents an interest on the part of the members of this subcommittee and this body to gain additional oversight and to utilize that oversight responsibility more effectively to reduce rules and regulations that go beyond the intent of Congress, we fully support that.

So from a policy standpoint, I would agree with what Mr. Eizenstat said. On a strict reading of the Constitution as articulated by the Supreme Court in *Chadha*, the terminology used is somewhat off-the-mark.

Senator GRASSLEY. Well, thank you very much.

Mr. SPEARS. Thank you, Senator.

Senator GRASSLEY. Our second panel consists of former Congressman from Georgia, Elliott Levitas. Congressman Levitas is now with Kilpatrick & Cody, a large Atlanta law firm with an office here in Washington. He has taken a very active role in trying to bring the legislative veto back to Congress.

Elliott, I know that you share my same interest, and I thank you for coming today.

Mr. LEVITAS. Thank you.

Senator GRASSLEY. We also have with us Mr. Stu Eizenstat. As I previously stated Mr. Eizenstat serving as President Carter's Chief Domestic Advisor. He was the administration's chief negotiator in dealing with the legislative veto with Members of Congress, trying to find an acceptable solution to that problem. He is now a partner with the law firm of Powell, Goldstein, Frazer & Murphy.

Both of these gentlemen have been instrumental in developing the concept of the appropriations limitation, and I will look forward to hearing their testimony.

I would also like to welcome Stan Brand. Stan was formerly the general counsel for the Clerk of the House of Representatives, where he worked on the *Chadha* case with Eugene Gressman. He comes to us today from his Washington law firm of Brand & Lowell.

Additionally, we have Prof. Eugene Gressman of the University of North Carolina at Chapel Hill. Professor Gressman was a special counsel to the House of Representatives and has been involved with all litigation on the validity of the legislative veto since 1976.

I welcome you all, and particularly thank you for being patient while we went through the long questioning process of the previous witnesses.

Elliott, I want to add, that I appreciate your friendship over the years, the 6 years I served with you in the House and the 4 years I served in the Senate while you were still in the House, and I look forward to being as successful in this area as you were in the years you slaved in the House. You were truly a pioneer in seeing that the congressional veto was always brought before the Congress. I imagine I voted on more Levitas amendments to House bills when I was in the House than maybe any amendments that any one Member offers in that 6 years.

Please proceed—and each of you proceed in the order in which I introduced you, and then I will question at the end.

STATEMENT OF A PANEL, INCLUDING: ELLIOTT H. LEVITAS, ESQ., KILPATRICK & CODY, WASHINGTON, DC; STUART E. EIZENSTAT, ESQ., POWELL, GOLDSTEIN, FRAZER & MURPHY, WASHINGTON, DC; STAN M. BRAND, ESQ., BRAND & LOWELL, WASHINGTON, DC, AND EUGENE GRESSMAN, PROFESSOR OF CONSTITUTIONAL LAW, SCHOOL OF LAW, UNIVERSITY OF NORTH CAROLINA, CHAPEL HILL

Mr. LEVITAS. Thank you very much, Senator Grassley, and I especially appreciate your personal comments.

I must observe that probably Henry Hyde would challenge you on the question of whether you voted more on my amendments than you did on his amendments, but we certainly were in there, pursuing these issues.

I want to commend you for the leadership you have taken in this area, and I am optimistic in believing that the results of your efforts, along with those of Senator Levin and others, will bear fruit during this Congress.

I will not read my statement, but would request that it be included as part of the record, and although I did not notice it in the package of materials that was made available to the public today, I think we sent it over on Friday, and I hope it is available.

Senator GRASSLEY. Yes, it is here.

Mr. LEVITAS. Good.

Let me, if I may, then, depart from the text of my prepared statement and make one or two specific observations. One of them is the fact that the time to act on this legislation is now, even though the sentiment that provides the basis for this legislation may be somewhat diminished simply because the regulatory efforts of this administration have not appeared as threatening as those of past administrations. I would only suggest that whatever one's political persuasion or party affiliation, there may be a time in the future when this type of regulatory environment will no longer exist. It may very well be that today, people do not view the Federal Trade Commission under the leadership of Jim Miller with the same fear and apprehension that they viewed it under the leadership of Mike Perchuk. But there are other Mike Perchuks out there and someday, they are going to be back in office. The time to put these procedures in place is now.

We do not write constitutions or due process provisions or the type of philosophy that is embodied in your legislation, S. 1145, for the moment. We do it for the ages. And the time to deal with it is now, not in terms of what administration may be in power now and what their political philosophy may be, but in terms of a process that, under any set of circumstances or political leadership, will be available to assure accountability. And I am very pleased to see that that is the theme that you have adopted in providing the sense of this legislation. It is accountability, because the question is today, as it always has been in the past, "who makes the laws in this country—is it the people who are elected and accountable to the public, or is it the people who are not elected and not accountable." And I think the question is simply one of accountability.

The other point that I would like to make is that the legislation which you and Senator Levin and Senator Dole and others have proposed is clearly within the constitutional ambit of the *Chadha* decision. Frankly, I would have preferred to see a joint resolution of approval for major regulations similar to that procedure proposed by you and Representative Trent Lott in the last Congress, and I would endorse entirely the comments made by Congressman Broyhill in this regard. But if the political reality is that the joint resolution of approval is not likely to gain support in the Senate, then I think that the procedure of S. 1145 is a major important step in the right direction, and one that, after it is put in place, can be revisited. Have some experience under this approach; see if it is sufficient, and then when the time comes, return to the issue. So this need not be the final statement on the subject, but it is one that needs to be done and needs to be done now.

I would also agree completely with Congressman Broyhill that the expedited procedures which you provide in your bill are absolutely essential in the case of a resolution of disapproval—that being because a committee, and particularly a committee chairman, who may be overly sympathetic with an agency, could bottle up a resolution of disapproval, and if there were any likelihood that that would occur, the expedited procedures will assure that the Members of the House and the Senate will have an opportunity to express their wishes and their desires reflecting their constituency interests.

Finally, let me make this observation, that perhaps the most important feature, the most effective feature, of S. 1145 and the proposed amendments to the Federal Trade Commission authorization, relates to the use of the appropriations process. This process would prohibit the appropriation of funds to implement or enforce a regulation when a majority in both Houses has votes to disapprove it—even if the President does not sign the disapproved resolution.

Using the cut-off of funds is not only going to be an effective means of dealing with the return legislative review of rulemaking, under present circumstances, but it is also clearly constitutional.

In my written testimony, I refer to the *Harris* v. *McRea* case, in which the Supreme Court dealt with the Hyde amendment and said that even though a woman may have a constitutional right to have an abortion that there was no constitutional requirement that Congress fund that right for indigent women, and in effect said that Congress has the right to decide what will and will not be appropriated.

In terms of the internal operation of the Congress, I can only speak from the House side, but I think that this method which your bill provides would be a far superior process to the present situation where a very convoluted procedure has to be used in order to put restrictions on appropriations in the House which are not reported out by an appropriations subcommittee.

Consequently, I think this approach would simplify rather than complicate the present procedure and would clearly say that where both Houses of Congress have spoken together on a particular matter, appropriations for implementing regulations, that have been disapproved, should not be permitted.

So I think the appropriations cut-off is not only clearly Constitutional, it is perfectly consistent with existing policy and precedent for actions in the Congress. As you know, Senator, there have been numerous instances over the years where riders have been put on appropriations bills that have prohibited or restricted or prevented executive agency or independent agency actions from going forward or regulations being implements as a result of an appropriations prohibition of the action on regulation.

The recent appropriations restriction by rules changes in the House have served to make that a more difficult process, but the principle and the opportunity still remains.

I want to commend you once again for the leadership you have shown, and I am very optimistic that your efforts are going to be successful during this Congress.

Thank you.

Senator **Grassley**. Thank you.

[Statement follows:]

PREPARED STATEMENT OF ELLIOTT H. LEVITAS

Mr. Chairman:

Thank you for affording me the opportunity to appear once again before this subcommittee and discuss the subject of Congressional review of rules and regulations issued by independent government agencies and executive branch agencies. Specifically, I will address the bill, S.1145, introduced by Senator Levin and co-sponsored by a number of members of the Senate including the chairman of this subcommittee.

I will refrain from passionately arguing for the necessity of some legislation of this type since I have spoken to that issue on so many previous occasions and because, I take it, that a majority of members of the Senate and the House of Representatives, as well as a majority of the public, believe there is a need to have some mechanism of this sort in place. I have had the privilege of working with many members of this subcommittee over the years to establish, in various statutes, provisions that give the Congress the right to review, and when necessary to disapprove, regulations that issue from the various bureaucracies. We worked together on these approaches both before the Chadha decision, as well as in the aftermath of that decision.

Whether the Congressional review mechanism is called a "legislative veto", or "the son of legislative veto", or by whatever name, this type of device is essential if an appropriate balance of power between the executive branch, independent agencies, and the elected Congress is to be maintained.

Rules and regulations issued by unelected officials have the force of law just as a statute passed by Congress. Therefore, the question today is the same as it has been in the past. That question is: "Who makes the laws in this country? Is it the people who are elected, or is it the people who are not?" At the end of the day, the question is one of accountability.

S.1145 represents a step in the right direction of establishing an orderly, uniform and effective procedure for providing Congressional review of rules and regulations issued by unelected officials in the bureaucracies. I support this bill. I believe it is a constitutional means of achieving some of the purposes that the various legislative veto mechanisms have sought to accomplish.

While I would frankly have preferred to see a somewhat different approach, the method adopted in S.1145 can be effective and certainly constitutes an improvement over the present situation. I would have hoped to see legislation that would require a joint resolution of approval for major rules and a joint resolution of disapproval for minor rules. As you will recall during the last Congress, several efforts along these lines were proposed, and the joint resolution of approval was added as an amendment to at least one bill in the House and a comprehensive bill embodying these concepts was introduced by Representative Trent Lott, the House Minority Whip, and many others, as HR.3939.

S.1145 adopts the joint resolution of disapproval, which in many cases may be sufficient. However, because a joint resolution would require Presidential approval (or alternatively a two-thirds majority in both Houses to override a veto,) there are a number of important instances where this method will not be effective, e.g. where a President vetoes a joint resolution simply to support the position of his appointees in the face of a majority of opposition in both Houses. Also, a joint resolution of disapproval is the same thing as passing a statute to repeal a regulation. In addition to that procedure's seeming to turn upside down the relative power of elected and unelected officials, it is a path that could always have been followed and is not new.

Nevertheless, the existence and statutory recognition of the procedure brings about a certain degree of accountability and sends a signal to the rule-making agencies that they are going to have to pass muster in Congress and answer specifically about the rational and factual basis for rules they issue including their reasonableness, workability, and wisdom. This exercise in and of itself, constitutes a significant constraint on a great many arbitrary and unreasonable, burdensome and costly actions that would otherwise come from these agencies.

One important feature of S.1145 that distinguishes the joint resolution of disapproval from other bills is the provision for "expedited procedures". In other words, the opportunity to discharge a committee of the joint resolution after a period of time and guarantees that it reaches a floor vote assures that joint resolutions cannot be pigeon-holed. Expedited procedures for joint resolutions of disapproval are a vital element in this legislation.

The other mechanism contained in S.1145 may, in the last analysis, become an even more effective tool for reviewing and blocking many regulations that Congress disapproves. I refer to the provision in the bill that provides when both Houses have adopted the joint resolution of disapproval (before or even without Presidential approval) it would then be out-of-order for either House to appropriate any funds which would be used for purposes of implementing the regulation which joint resolution has disapproved.

Even though some rules and regulations would have legal effect without the expenditure of any funds for their implementation, (and therefore would not be blocked by this provision), nevertheless, in the majority of cases, regulations issued by agencies do require some implementation by that agency--from the minimal activity of printing and publication of the regulation, all the way up to its active enforcement. In these instances, the action by Congress to disapprove the regulation would serve to cut off the funds to that agency and prohibit any use of funds for the implementation of the regulation. This form of a legislative veto will provide a great deal of authority and accountability in the Congress over the rule-making of federal agencies.

In 1983, I proposed a series of possible Congressional responses to the Chadha decision. One of those responses was use of the appropriations process along the lines of S.1145. I refer you to testimony I gave to this Committee on July 20, 1983 and on September 21, 1983. In addition, I refer to my testimony before the House Rules Committee on November 10, 1983. In each of these instances there was extensive discussion of post-Chadha alternatives, including the S.1145 concept of the appropriations cut-off route. If the Committee desires, I would be pleased to submit copies of this prior testimony to you.

Finally, I submit for your consideration two law review articles which discuss these issues that I co-authored with Stanley M. Brand, former counsel to the Clerk of the House. The articles are The Georgetown Law Journal, February 1984, "Congressional Review of Executive and Agency Actions after Chadha: The 'Son of Legislative Veto' Lives On" and Hofstra Law Review, Spring 1984, "The Post Legislative Veto Response: A Call to Congressional Arms".

Turning to the question of constitutionality, it is clear that both of these devices contained in S.1145 are clearly constitutional and would meet even the test contained in the flawed constitutional reasoning of the majority of the court in the Chadha decision. Obviously, the joint resolution of disapproval, requiring action by both Houses and Presidential concurrence (or veto override) is legislation of the sort described by the court with favor in the Chadha decision. (Incidentally, the "son of legislative veto" approach, that is the joint resolution of approval for major rules, would also meet the constitutional test and the Chadha requirements.)

The second mechanism of withholding funds is also a constitutional approach. Congress, through its control of the purse strings, has unquestioned authority whether to fund or not to fund any function or operation it chooses to. The unlimited discretion of either House of Congress not to appropriate funds for a particular function is basic to our system. Just because an Administration seeks funding of some particular function does not mean that the Congress is required to fund all or any part of it whether it is MX missiles or abortions for poor women. In fact, this was one of the issues before the court in the 1979 case, Harris v. McRae (448 U.S. 297), involving funding for abortions. In that case the court said that although a woman had a right to have an abortion if she so chose to do so, there was no requirement that Congress provide funds for indigent women to have an abortion. The fact that Congress by adopting the Hyde Amendment cut off funds for abortions for indigent women, except under certain specified circumstances, did not give the woman a right to sue for funding of the abortion if Congress did not appropriate the money.

Accordingly, if the legislation (S.1145) provides a procedure in which, under the rules of either House of Congress, certain appropriations would be made out-of-order and, therefore, could not be part of an appropriations bill, that is clearly within the constitutional powers of each House to determine what it chooses to appropriate. Thus, the provisions in S.1145 setting up those procedures, making certain appropriations out-of-order under certain circumstances, is solely a matter for each House of Congress to determine and, therefore, clearly constitutional and within the obvious constitutional powers of either House of Congress to appropriate or not appropriate funds, Harris v. McRae, supra.

It is for these reasons that I would strongly urge this committee to approve S.1145 and that both Houses of Congress enact this legislation without delay.

While I do not believe it is necessarily the best answer, nor do I believe it will be the final answer, I am convinced it is a step that needs to be taken--and taken now. It needs to be taken in order to end the confusion and confrontation that the ongoing judicial and Congressional battles over legislative vetos have brought about. It needs to be done in order to provide an orderly mechanism for Congressional review and accountability of rules and regulations issued by unelected officials.

After a period of time, with experience gained under the methods provided by S.1145, Congress can return to this issue at some point in the future and make whatever changes or improvements in this approach as may be needed. On the other hand, to do nothing at this point would be for Congress to perpetuate the confusion and problems brought about since the Chadha decision and at the same time leave the unelected officials in a position of issuing rules and regulations that have the force and effect of law without some orderly method for Congressional review and disapproval where necessary. Aside from being bad policy, failing to act would amount to a shirking of responsibility by elected Senators and Representatives for the laws that govern this nation.

I will be happy to answer any questions which members of the committee might have.

Senator GRASSLEY. Mr. Eizenstat.

Mr. EIZENSTAT. Mr. Chairman, I, too, would like to applaud your leadership in this area.

In my opinion, the Grassley-Levin bill provides Congress with a flexible and constitutional means by which to review, as Congress sees fit, the proposed rules of the executive branch and independent agencies and to meet the Supreme Court's objections to legislative vetoes expressed in the *Chadha* decision.

Congress had a twofold purpose in institutionalizing the concept of legislative vetoes. First, it recognized that in a modern industrial democracy, the circumscriptions of Executive power that existed before 1932 were no longer practical and that the executive branch needed to have more delegated authority. But second, it qualified that recognition by recapturing in an oversight mechanism some of the authority it had surrendered in the interests of accomplishing necessary governmental tasks. In this way, Congress delegated greater authority to the President and the executive branch. It wanted to assure that authority was exercised in the way Congress had intended.

The virtual crescendo in the enactment of legislative vetoes during the late 1970's and 1970's stemmed in large part from a growing mistrust of the executive branch by the Congress. Of the 400 or so legislative veto provisions enacted since 1932, at least two-thirds were passed after 1970. The Watergate debacle gave particular impetus to the legislative veto trend. No fewer, Mr. Chairman, than 83 legislative veto provisions were enacted in the 2-year period after Watergate.

The propensity of the Congress in the post-Watergate era to insist on greater congressional oversight of Presidential action is evident. The creation of the congressional budget process; the greater oversight of arms sales and exports, the War Powers Act; congressional permission of a lapsing in wage and price control and credit control authority, the latter of which we used in 1980; the limitation on covert action by the CIA; the specificity of appropriations language—all these signaled a determination by the Congress to wrest power from the Presidency.

The legislative veto movement was part of this trend. Congress' persistent inclusion of the legislative veto device in legislation was a matter of concern to our administration and frankly, a source of irritation to President Carter. He harbored serious doubts about both its constitutionality and its wisdom, and on June 21, 1978, expressed those doubts in a message to the Congress. The legislative veto had become a source of confrontation between the President and the Congress. President Carter normally signed bills with legislative vetoes, but expressed reservations about them in his signing statements, and did not intend his Cabinet officers to feel bound by them. Indeed, he asked Attorney General Griffin Bell to actively seek a judicial test, and frequently expressed his concern that it was taking so long to bring the issue to a court challenge. He proposed a report-and-wait procedure by which the executive branch agencies would send their proposed regulations to Congress for a specified period before those regulations would become final. In his opposition to legislative vetoes, President Carter reflected a traditional view of Presidents that legislative vetoes represented an unconstitutional and unwarranted intrusion on Presidential power.

My experience in the White House has led me to a number of conclusions concerning the legislative veto. First, legislative veto provisions are of varying utility as an oversight mechanism, depending on whether they are directed at agency action or directly at Presidential action. It is unrealistic to suppose after *Chadha* that any of the devices remaining to Congress will facilitate congressional oversight of direct Presidential authority.

Conversely, Presidential powers not expressed or implied in the Constitution, such as the power to defer spending of previously appropriated funds, are perhaps not as likely to be delegated by the Congress to the executive branch. Thus, *Chadha* may have the ironic result of making Congress less willing to delegate authority to the President because oversight will be so difficult.

In any case, the use of legislative vetoes to check the Chief Executive himself is an action over which I have little enthusiasm. However, I fully support Congress' desire to oversee the workings of administrative and executive agencies. Congress has a legitimate and even necessary role in the process by which agencies promulgate the rules and regulations pursuant to statutes passed by the Congress. When an agency promulgates a rule, it is in a practical, if not in a strictly constitutional way, engaging in what amounts to a legislative task, in effect, completing the implementation of policies that Congress has established.

Therefore, Congress should have a significant role in the issuance of those regulations. The Grassley-Levin bill strikes a reasonable balance in assuring appropriate legislative review without crossing the constitutional barriers which *Chadha* erected.

The reality, Mr. Chairman, is that Congress is going to insist on some legislative mechanism. To think otherwise, I believe, is naive. It is important that the oversight mechanism be one of general applicability. *Chadha* called into question the constitutionality of hundreds of statutes. Without general legislation such as that which you have proposed, we are faced with the prospect of limitless piecemeal activity both by the judiciary and by the Congress.

The report-and-wait approach embodied in your bill is, in my opinion, the best way of balancing all of the competing objectives. This becomes especially clear when one looks at the available alternatives. The requirement that Congress pass an affirmative legislative act before any rule goes into effect would be, to me, unacceptable as a procedure of general application. While constitutional, this type of measure would effectively stop any rulemaking by the executive branch or independent agencies.

On the other hand, a mechanism that relied solely on Congress' power to appropriate funds might also be ineffective. The appropriations process involves a complex machinery, normally operates only prospectively, and is usually directed at large batches of government functions of which one rule or even one agency may only be a small part.

By contrast, the report-and-wait provisions of your bill accommodate most of the concerns that arise in the oversight context. Those provisions automatically trigger congressional scrutiny when an agency publishes a rule without requiring Congress to spend any time on it. Congress, Mr. Chairman, is not forced to deal with each and every regulation. This is purely discretionary under your bill. And at the same time, the bill would allow Congress to continue delegating necessary powers to executive agencies.

Such report-and-wait provisions also have an important history as instruments of congressional oversight. For example, it ought to be pointed out that rules of court, such as the Federal Rules of Civil Procedure or Federal Rules of Evidence, once promulgated by the Supreme Court, are also subject to a congressional waiting period before taking effect.

The report-and-wait provisions of your bill are a natural procedure in the agency context. Realistically, congressional power in this kind of oversight is not really residing in the actual exercise of the veto. In fact, even prior to *Chadha,* actual use of the legislative veto to nullify agency rulemaking has been rare. The real congressional leverage resides in the threat of the veto. Under such circumstances, a Cabinet Secretary or agency head is under great pressure to modify a proposed regulation strongly opposed by the committee which oversees the Secretary's Department and authorizes its program.

The beauty of your report-and-wait approach is that it does no more than formalize the natural process of negotiation.

Of course, Congress will be compromising its position relative to the pre-*Chadha* days by submitting to a bicameral vote and the prospect of a Presidential veto. But at the same time, the agencies will also be giving up something—their ability to promulgate regulations with immediate effect.

One complaint sometimes made about the report and wait approach is that the delay it automatically imposes will somehow subject routine rules to unnecessary scrutiny and will work to the detriment of necessary and pressing regulations. In my view, in ways in which I go in greater detail in my prepared text, your bill provides for such circumstances quite adequately.

The report and wait approach of the Grassley-Levin bill is not only constitutionally sound, therefore, but also the most practical and least intrusive means for Congress to maintain effective oversight over agency regulation.

One last point is that the most important of the bill's remaining provisions is an invocation of Congress' appropriations power as a means of enforcing any disapproval of a rule by joint resolution. This provision embodies a potentially effective enforcement approach. But, like the legislative veto itself, the appropriations provision promises to achieve its goal as much through its specter as through its actual exercise. It is unlikely that a President facing a major appropriations bill with hundreds of items in it would veto it on account of one provision. It is more likely, however, that the prospect of a restrictive appropriations measure would discourage both the agency and the President from precipitating a confrontation with Congress. There are legitimate concerns with this appropriations provision. There is no guarantee that an appropriations measure would reach the floor soon enough after the waiting period to close the window of time during which the offending rule could legally be promulgated. The procedural device contemplated by the bill—a point of order—might introduce procedural redtape that could frustrate the appropriations process, and it is already obvious that some members of the appropriations committees will have problems with what they see as an intervention in their jurisdiction.

Also, it is almost certain that Presidents will probably oppose it, because they will see it as thwarting their will if they veto a joint resolution. Therefore, you may wish to have some type of sunset provision for this to test it.

Nevertheless, the appropriations provision is a matter of internal congressional procedure. It is, in my opinion, fully constitutional.

I, therefore, conclude by saying that your bill is a thoughtful and sound resolution to the uncertainty that has existed for 2 years now since *Chadha* in the area of congressional oversight and bears support by the entire Senate.

Senator GRASSLEY. Thank you, Mr. Eizenstat.

[Statement follows:]

PREPARED STATEMENT OF STUART E. EIZENSTAT

I am Stuart E. Eizenstat, a partner in the firm of Powell, Goldstein, Frazer & Murphy in Washington, D.C., and formerly Chief Domestic Policy Adviser to President Jimmy Carter and Executive Director of the Domestic Policy Staff of the White House. I wish to thank you and your colleagues, Mr. Chairman, for inviting me to give my views today on S.1145, the Grassley-Levin Bill, which is designed to facilitate Congressional oversight of agency rulemaking in a constitutionally appropriate manner.

The Grassley-Levin Bill provides Congress with a flexible and constitutional means by which to review, as Congress sees fit, the proposed rules of Executive Branch and independent agencies, and to meet the Supreme Court's objections to legislative vetoes as expressed in the Chadha decision.

By now the history of legislative veto provisions has become rather familiar, and I will not attempt to restate it in detail. What emerges from a review of the history is a sense of Congress' purposes in institutionalizing the legislative veto device. When Congress delegated broad powers to President Herbert Hoover in 1932 to reorganize the executive branch, subject to the negative of a one-house resolution, it was doing two things. It was recognizing that modern industrial democracy would no longer accommodate the strict circumscription of executive power; delegation of further authority to the executive branch was in some cases appropriate in order to give the President greater discretion to meet the problems presented by modern society. But it was also qualifying that recognition in the manner of a quid pro quo, by recapturing in a veto or oversight mechanism some of the authority that it had surrendered in the interest of accomplishing a necessary governmental task. In this way, Congress delegated greater authority to the President but wanted to assure continued oversight so that the authority was exercised as Congress intended. While the context has changed, these remain central characteristics of the legislative veto issue.

One can plausibly explain subsequent use of the legislative veto tool as a response first to economic depression, then to wartime crisis, then to postwar concerns about national security, and so on. However, there is no question that the virtual crescendo in the enactment of legislation containing provisions for a "legislative veto" during the late 1960s and 1970s stemmed largely from a growing mistrust of the executive branch quite in contrast to the enthusiasm with which Congress delegated broad powers to Herbert Hoover and Franklin Roosevelt. That mistrust was in part directed toward the office of the President, after a generation of perceived executive usurpation, though it also embodied a general anti-Washington, anti-regulation attitude. Of the 400 or so legislative veto provisions enacted since 1932, at least two thirds were passed after 1970. The Watergate debacle which engulfed the Nixon presidency gave particular impetus to the legislative veto trend: no fewer than eighty-three legislative veto provisions were enacted in the two-year period 1974-75.[1]

Whether we term it a vigilant exercise of Congress' powers of oversight or a mistrust of the executive, the propensity of the Congress in the post-Watergate era to insist on greater Congressional oversight of Presidential action is evident. The creation of the Congressional budget process in 1974, the oversight of arms sales and exports, the War Powers Act, the lapse in wage and price control and credit control authority, the limitation on covert actions by the CIA, the specificity of appropriations language, all signaled a determination by Congress to wrest power from the Presidency. The legislative veto movement was part of this trend.

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[1] These figure have been compiled from the following sources: Legislative Veto After Chadha: Hearings Before the House Committee on Rules, 98th Cong., 2d Sess. 447 (1984) (excerpt from book by Prof. Arthur Maass); Rosenberg, Congressional Life After Chadha: Searching for an Institutional Response, Cong. Research Service Rev. 5, 5 (Fall 1983); Fisher, Legislative Vetoes Enacted After Chadha (Congressional Research Service print) (March 25, 1985); Rosenberg, The Legislative Veto in the Courts: Constitutional Challenges Before and After Chadha, nonpublished manuscript on file with Congressional Research Service, at 2.

I can attest from my experience as Chief Domestic Policy Adviser to President Jimmy Carter that Congress' persistent inclusion of the legislative veto device in legislation was a matter of concern to us and a source of irritation to the President. President Carter harbored serious doubts about both the constitutionality and the wisdom of the legislative veto; on June 21, 1978, he expressed those doubts in a Message to the Congress:

> Unnecessary and unwarranted legislative veto procedures obstruct the efforts of my Administration and most members of Congress to make the administrative process quicker and simpler and divert attention from our common task of improving Federal programs and regulations. . . .
>
> Such intrusive devices infringe on the Executive's constitutional duty to faithfully execute the laws. They also authorize Congressional action that has the effect of legislation while denying the President the opportunity to exercise his veto. Legislative vetoes thereby circumvent the President's role in the legislative process established by Article I, Section 7 of the Constitution. . . .
>
> Moreover, the legislative veto raises serious, practical policy problems. . . .
>
> In sum, for both constitutional and policy reasons, I strongly oppose legislative vetoes over the execution of programs.[2]

President Carter more than once expressed his misgivings about such provisions even while signing them into law.[3] Ultimately the legislative veto become a source of confrontation between the President and Congress that did honor to neither branch of government.

President Carter normally signed bills with legislative vetoes but expressed reservations about them and did not intend his Cabinet officers to feel bound by them.[4] Indeed, he asked Attorney General Griffin Bell to actively seek a judicial test and frequently expressed irritation that it was taking so long to bring the issue to a court challenge. President Carter proposed a "report and wait" procedure by which the Executive Branch agencies would send their proposed regulations to Congress for a specified period before promulgating final regulations.

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[2] President's Message to Congress on Legislative Vetoes, *Pub. Papers* 1146-49 (June 21, 1978).

[3] *See*, *e.g.*, President's Statement on Signing H. R. 3757 (National Parks and Recreation Act Amendments) Into Law, *Pub. Papers* 432-33 (March 5, 1980).

[4] *See*, *e.g.*, President's Message to Congress on Legislative Vetoes, *Pub. Papers* 1146, 1149 (June 21, 1978).

> . . . . For areas where Congress feels special oversight of regulations or other actions is needed, I urge the adoption of "report-and-wait" provisions instead of legislative vetoes. Under such a provision, the Executive "reports" a proposed action to Congress and "waits" for a specified period before putting it into effect. This waiting period permits a dialogue with Congress to work out disagreements and gives Congress the opportunity to pass legislation, subject to my veto, to block or change the Executive Action.[5]

However, the principal proponent of the legislative veto in the House rejected the compromise.

In his opposition to the legislative veto, President Carter reflected a traditional view of Presidents that legislative vetoes represented an unconstitutional intrusion on Presidential power. Not surprisingly, while President Reagan endorsed the legislative veto during his campaign in 1980, his Administration soon came to oppose them.

My experience in the executive branch has led me to a number of conclusions concerning the legislative veto. First, legislative veto provisions are of varying utility as an oversight mechanism depending on whether they are directed at agency action or at presidential action. It is unrealistic to suppose, now that Chadha has required bicameral passage and presentment to the President for any "legislative veto" provision, that any of the devices remaining to Congress will facilitate close Congressional oversight of direct Presidential authority. A "report and wait" provision, such as is included in the Grassley-Levin Bill, will not offer substantial leverage to a Congress that finds itself in a highly political confrontation with a President threatening an executive veto. A restriction on appropriations, which is another weapon that Congress possesses, may come only after actions by the executive branch and also raises the possibility of a presidential veto if the issue is sufficiently important. A requirement of an affirmative legislative act defeats the very purpose of the delegation and is, again, subject to a presidential veto.

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[5] Id. at 1148-49.

It appears under these circumstances that Congressional attempts to constrain traditionally expansive Presidential power can have little substantive influence. Conversely, Presidential powers not expressed or implied in the Constitution, such as the power to defer spending previously appropriated funds, are not as likely to be delegated by Congress if the only checks available to it are the ones Chadha seems to require. Thus, Cnadha may have the result of making Congress less willing to delegate authority to a President when oversight is so difficult. In any case, the use of the legislative veto to check the Chief Executive is an action for which I have little enthusiasm.

However, I fully support Congress' desire to oversee the workings of the administrative agencies. Congress has a legitimate and even necessary role in the process by which agencies promulgate the rules and regulations, pursuant to statutes passed by the Congress, that have such a profound impact on our society. Moreover, when an agency promulgates a rule it is engaging in a legislative task, in effect completing the details on the implementation of the policies Congress has established. Congress should have a significant role in the issuance of such regulations. The Grassley-Levin Bill, which confines itself to Congressional oversight of agency rules, strikes a reasonable balance in assuring appropriate legislative review without crossing the constitutional barriers that Chadha erected.

Some commentators feel that "legislative veto" provisions merely encourage Congress to delegate "tough questions" to the agencies,[6] while others believe that such provisions violate the spirit if not the letter of the doctrine of separation of powers.[7] The reality, however, is that Congress requires *some* oversight mechanism, unless indeed it is to face what Justice White, dissenting in *Chadha*, termed

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[6] See, e.g., Industrial Union Department, AFL-CIO v. American Petroleum Institute, 448 U.S. 607, 671-88 (1980) (Rehnquist, J., dissenting); R. Litan & W. Nordhaus, Reforming Federal Regulation 108 (1983).

> a Hobson's choice: either to refrain from delegating the necessary authority, leaving itself with a hopeless task of writing laws with the requisite specificity to cover endless special circumstances across the entire policy landscape, or in the alternative, to abdicate its law making function to the executive branch and independent agencies. To choose the former leaves major national problems unresolved; to opt for the latter risks unaccountable policymaking by those not elected to fill that role.[8]

It is also important that the oversight mechanism be one of general applicability. *Chadha* called into question the constitutionality of hundreds of statutes. Without general legislation, such as that proposed by Senators Grassley and Levin, we are faced with the prospect of limitless piecemeal activity both by the judiciary (to determine the question of severability with regard to each statute containing a legislative veto provision) and by the Congress (to resurrect legislative oversight for each of the statutes in which, according to *Chadha*, it had been improperly legislated). Thus, the question is not so much the need for legislative oversight as the wisest constitutional means of achieving it.

The "report and wait" approach embodied in the Grassley-Levin Bill is the best way of balancing all the competing objectives.

This becomes clear when one looks at the available alternatives.[9] A requirement that Congress pass an affirmative legislative act before any rule goes into effect, as was proposed as part of the reauthorization of the Consumer Product Safety Commission in 1983, would be unacceptable as a procedure of general application. While probably constitutional, this type of measure would effectively stop any rulemaking by the Executive Branch or independent agencies. Congress would confront the undesirable and, indeed, impossible job of passing as legislation each of thousands of regulations, and the agencies would be reduced to little more than advisory councils.

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[7] *See*, *e.g.*, *The Supreme Court Decision in INS v. Chadha and Its Implications for Congressional Oversight and Agency Rulemaking: Hearings Before the Subc. on Ad. Law and Gov't Rel.*, 98th Cong., 1st Sess. 143 (1983) (testimony of Alan B. Morrison).

[8] *Immigration and Naturalization Service v. Chadha*, 77 L. Ed. 2d 317, 355 (White, J., dissenting).

[9] I am not attempting here to catalogue all the conceivable responses to *Chadha*. See Elliott, *INS v. Chadha: The Administrative Constitution, the Constitution, and the Legislative Veto*, 1983 Sup. Ct. Rev. 125, 156-57, and Rosenberg, *Congressional Life After Chadha: Searching for an Institutional Response*, Cong. Research Service Rev. 5 (Fall 1983) for a more extensive overview. I am limiting myself to realistic options that do not drift too far toward either of the extremes that Justice White lamented.

On the other hand, a mechanism that relied *solely* on Congress' power to appropriate funds would also be relatively ineffective. The appropriations process involves a complex machinery that cannot be set in motion at will; it normally operates only prospectively; and it is usually directed at large patches of government functions of which one rule or even one agency may be only a small part.

By contrast, the "report and wait" provisions of the Grassley-Levin Bill -- 90 days in the case of a "major" rule, 45 days in the case of a "nonmajor" rule -- accommodate most of the concerns that arise in the oversight context. Those provisions automatically trigger the framework for Congressional scrutiny when an agency publishes a rule, without requiring Congress to spend any time on it whatsoever. At the same time the bill would allow Congress to continue delegating necessary powers to the agencies.

Such "report and wait" provisions have an estimable history as instruments of Congressional oversight. For example, rules of court such as the Federal Rules of Civil Procedure and the Federal Rules of Evidence, once they have been promulgated by the Supreme Court, are subject to similar Congressional waiting periods before taking effect.[10] In fact, the majority of "legislative veto" provisions prior to *Chadha* were of the "report and wait" variety; the chief differences in the proposal before the Senate are that the older pre-Chadha statutes did not provide for bicameral passage and presentment to the President and did not always specify such specific "waiting periods". The provisions here appear to be in accord with the requirements of Chadha -- bicameral passage and presentment to the President -- and thus fully constitutional.

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[10] For an explanation of the process by which such rules are adopted, see 64 L.Ed.2d xlv, fn. 1. The "report and wait" process of Congressional oversight in this context has by no means been an idle one. *See*, *e.g.*, Act of Sept. 28, 1976, Pub. L. No. 94-426, 90 Stat. 1334 (1976) (amendment of 28 U.S.C. §2255).

If one looks carefully at the way in which Congressional oversight of agency action has traditionally operated since the legislative veto was first devised, one sees more clearly that the "report and wait" provision of the Grassley-Levin Bill is a natural procedure in the agency context. Realistically, Congressional power in this kind of oversight has not lain in the actual exercise of the veto. In fact, even prior to Chadha, legislative vetoes have been rare -- 226 actual vetoes out of 1180 proposed veto resolutions. Only 19 of these 226 served to nullify agency rulemaking; most of the successful veto resolutions related to suspensions of deportation by the Attorney General during the period from 1949-1960 or to Presidential deferrals of spending under the Budget and Impoundment Control Act of 1974.[11] The real Congressional leverage has always resided in the threat of a veto, which could usually be relied upon to persuade an agency to withdraw or modify a proposed rule to the satisfaction of the appropriate Congressional committee. Under such circumstances a Cabinet Secretary or an agency director is under great pressure to modify a proposed regulation strongly opposed by the Committee which oversees the Secretary's Department and authorizes its program. For example, in our Administration, the Department of Education significantly revised its proposed bilingual education regulations after Congress passed resolutions of disapproval. This unpleasant episode clearly persuaded the Department of Education to revise its regulations at an earlier stage when key members of the authorizing committee objected to such regulations on subsequent occasions.[12]

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[11] Rosenberg, The Legislative Veto in the Courts: Constitutional Challenges Before and After Chadha, unpublished manuscript on file with Congressional Research Service, at 2.

The beauty of the "report and wait" approach is that, ultimately, it should do no more than formalize this process of negotiation. An agency that understands that Congress has a period of time to scrutinize proposed rules will be quite careful to make those rules as consistent as possible with Congressional intent. It is also noteworthy that the bill provides that joint resolutions, once introduced, are to be referred to the committee with juridsiction over the offending agency. This, again, will maintain the same agency-committee dynamic and minimize the chance that a disgruntled anti-regulation legislator without an interest in the particular agency will foil an agency rule. Ideally, the Congress and its committees of jurisdiction will invoke the oversight mechanism only as their priorities dictate.

Of course, Congress will be compromising its position relative to the pre-Chadha days by submitting to a bicameral vote and the prospect of an executive veto. But the agencies will also have given up something: their ability to promulgate regulations with immediate effect, occasionally exercised in the past in derogation of legislative policy. In short, the relative bargaining positions of Congress and the agencies will not have been greatly altered by the "report and wait" approach, nor will the informal process of negotiation that underlies the regime of Congressional oversight.

One complaint that is sometimes made about the "report and wait" approach is that the delay it automatically imposes will subject routine rules to unnecessary scrutiny and will work to the detriment of necessary and pressing regulation. In my view, the bill provides for such exigencies quite adequately. Routine rules or rules of insignificant impact will have a shorter "waiting period" and need not detain the Congress or the committees of jurisdiction. More important, "emergency rules" -- so characterized merely at the unreviewable explanation of the agency -- will go into effect immediately and be exempt from the "report and wait" provisions (although they will expire naturally after 120 days). And it is worth noting, for those who might regard this bill solely as an anti-regulation measure, that it provides that agency amendments and repeals of regulations will be subject to "report and wait" requirements just as affirmative promulgations are.

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[12] See Jordan & Riddle, The Legislative Veto in Federal Education Legislation: Provisions, Applications, and Alternatives, Cong. Research Service Rev. 25, 26-27 (Fall 1983)

Therefore, it is my view that the "report and wait" approach of the Grassley-Levin Bill is not only constitutionally sound but also the most practicable and least instrusive means for Congress to maintain lawful and effective oversight over agency regulations.

The bill has some innovative provisions for expediting consideration of joint resolutions of disapproval of agency rules. As these are a matter of internal Congressional procedure, I express no opinion on them. However, some commentators have expressed concern that procedures to expedite consideration might exalt consideration of measures concerning even unimportant rules unnecessarily at the expense of more fundamental matters on the Congressional agenda.[13] This is a genuine concern, and I would recommend that Congress add a "sunset" provision to this portion of the bill to insure that these procedures are scrapped if they prove impractical during the initial period during which they are in effect.

The most important of the bill's remaining provisions is an invocation of Congress' appropriations power as a means of enforcing any disapproval of a rule by joint resolution. The bill provides that once a joint resolution of disapproval has been adopted by both Houses a point of order will lie against a vote on final passage of a bill or resolution that appropriates funds to the offending agency, unless the measure specifically prohibits the use of such funds to carry out the disapproved rule. This provision embodies a potentially effective enforcement approach. There is no reason why Congress should not use all the institutional means at its disposal to enforce its will with respect to otherwise unaccountable administrative agencies. I suggested this approach after the Chadha decision, as an example of how far Congress could constitutionally go to maintain its oversight of regulations.

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[13] Rosenberg, *Congressional Life After Chadha: Searching for an Institutional Response*, Cong. Research Service Rev. 5, 6-7 (Fall 1983).

The substantive impact of the appropriations provision would occur in situations in which a President has either vetoed or failed to sign within the prescribed "waiting period" the joint resoluton of disapproval passed by both Houses of Congress. Thus, the provision is a Congressional lever against what Congress would consider a Presidential frustration of its attempt to stay an agency rule.

Like the legislative veto itself, the appropriations provision promises to achieve its goals as much through its spectre as through its actual exercise. The process might be set in motion if the President vetoed a joint resolution of disapproval and Congress, seeking to avoid the route of overriding the veto and its attendant requirement of a two-thirds vote, tried to accomplish the same result by passing an appropriations measure that prohibited promulgation of the rule -- one that would require but a majority vote. It is much less likely that a President facing a major appropriations bill with hundreds of items in it would veto it on account of one provision.

It is more likely, however, that the prospect of a restrictive appropriations measure would discourage both the agency and the President from precipitating a confrontation with Congress. Passage of the joint resolution by both Houses of Congress, along with the threat of a restriction on appropriations, might persuade an agency to withdraw a controversial rule. Similarly, the President would have strong incentives not to provoke the Congress to toss a new monkey wrench into the always complex appropriations process, especially when he is unlikely to veto the resulting appropriations measure solely on that ground. Thus, while the appropriations process is a cumbersome tool of Congressional oversight when used alone, as used here it is an important back-up device, particularly since the President will not always be amenable to joint resolutions of disapproval of agency action.

There are, however, legitimate concerns with the appropriations provision. There is no guarantee that an appropriations measure will reach the floor soon enough after the "waiting period" to close the "window of time" (Senator Hatfield's phrase) during which the offending rule can legally be promulgated. Some have also suggested that the procedural device contemplated by the bill -- a point of order -- could introduce procedural red tape that would frustrate the appropriations process. I assume the Appropriations Committees might have some problems with what they could see as an intervention in their jurisdiction.

But the appropriations provision does demonstrate a level of determination to back up the "report and wait" provisions with as much muscle as possible. Since it is a matter of internal Congressional procedure, it is fully constitutional.

The case for legislative oversight is a strong one. The Grassley-Levin Bill is a thoughtful and constitutional response to the post-_Chadna_ problem. I warmly support the general "report and wait" approach it embodies for legislative review of agency rules and regulations. It is a good solution to the uncertainty that has existed for two years in the area of Congressional oversight of agency action and regulations. *

*Mr. Eizenstat wishes to acknowledge the invaluable assistance of Paul W. Kahn, a professor at the Yale Law School, and Clyde S. Spillenger, a student at Yale.

Senator GRASSLEY. Mr. Brand.

Mr. BRAND. Thank you, Mr. Chairman.

It is nice to be back in the home court where the Constitution is so well understood. I want to focus in my brief comments, amplified more in my prepared statement which I would like to submit for the record, on what I think is the constitutional gloss on the greatest innovation of S. 1145, and that is the appropriation cutoff provision which utilizes the dual appropriation and rulemaking power of the House and Senate.

If we learned—or at least, speaking for myself, and not for Gene Gressman—if I learned one lesson the hard way in litigating *Chadha* and some of its progeny, it is that we failed to appreciate the need to lay the foundation for our constitutional position in the same way that the Executive had, and while Attorneys General began to write opinions in law journals and other publications—although they were speaking essentially to themselves, they were also speaking to others—we did not do as good a job at that as we might have.

So, while it appears—and if I have heard everybody on the panel so far agree that this is a constitutional means—it appears that it is self-evident that the appropriations rulemaking power can be used in this way, I believe we should take nothing for granted in the continuing war between the branches over the constitutional balance of power.

We cannot forget that it was the Executive in 1929 who requested that a legislative veto be put in the Reorganization Act to afford them a way around the plenary legislative process, only later to attack that provision as unconstitutional, and others like it. I think that argues in favor of paying some attention and some careful attention to the constitutional underpinnings of this appropriations rulemaking power. The Congress has been given authority by the Constitution to pay the debts and provide for common defense and welfare, make all laws necessary and proper for carrying into execution those powers, and the Constitution separately provides in article I, clause 9, clause 7, that no money shall be drawn by the Treasury but in consequence of appropriations made by law.

As a direct corollary to the power of Congress to appropriate is the power to tax, and only the Congress has that power. That power was reposed in the Congress for an obvious purpose, because as an early Supreme Court decision states, "the legislature acts upon its constituents when it taxes, and that is the best security against an erroneous or abusive tax."

In the American context as well as the British context, the power to appropriate money was viewed as an essential element of legislators' prerogatives. In England, it was the subject of a struggle over parliamentary supremacy which began with the Parliament taking from the King the power to direct and levy taxes on his subjects.

As Congressman Levitas mentioned, this power has been affirmed recently by the Supreme Court in *Harris* v. *McRea* and other cases, which make clear that it is really Congress' prerogative to determine under what conditions it will appropriate money. There is little doubt, I think, that the congressional power over the Federal purse is a very immense power indeed.

Turning next to the internal rulemaking authority, the Constitution provides in article I, section 5, that each House shall make its rules, and the Supreme Court has stated that this empowers each House to act in a plenary fashion with respect to its own proceedings. "It may not ignore constitutional restraints or violate fundamental rights, but within these limitations, all matters of method are open to the determination of the House."

In fact, the *Chadha* case itself acknowledged the rulemaking authority as an exception from the bicameral and presentment requirements for legislation, and in that decision at page 955 and 956, footnote 20, the Court stated: "One might also include another exception to the rule that congressional action having the force of law be subject to the bicameral requirement and presentment clauses. Each House has the power to act alone in determining specified internal matters."

The Court's reference to the article I, section 5 rulemaking power is an instance in which, in its own words, "One House may act alone with the unreviewable force of law not subject to the President's veto," and reaffirms the textual power of Congress to invoke the rulemaking clause to bar consideration of appropriations. And as the Supreme Court has held, while this exception only empowers Congress to bind itself, that is all that the provision in S. 1145 purports to do. The mechanism simply does not run afoul of the *Chadha* test for legislation, that test being that it has the purpose, and effect, of altering the legal rights, duties, and relations of persons outside the Congress, because it does not seek to do so.

The full measure of the internal nature of this mechanism is substantiated by the fact that once an appropriation bill has passed, if a point of order has been waived against it or not asserted, the point of order has no bearing on the validity of the enacted law, and so it is clear that it is purely a matter for House consideration.

In tandem, then, the appropriation and rulemaking powers of Congress provide a constitutional means for which to check agency action. There would seem to be little doubt that Congress can deny itself through its rulemaking authority the power to enact legislation, and thereby deny the agencies the ability to act.

As the Court conceded in *Chadha,* Congress ultimately controls administrative agencies and the legislation that creates them. Where Congress has failed to legislate or appropriate, albeit because of its own internal rules, there simply is no constitutional complaint. One historical example of this power actually occurred in the Eisenhower administration, over statutory provisions that required agencies to come into agreement with committees before implementing administrative action. The Justice Department objected to these on constitutional grounds. In response, the Congress simply changed its internal procedures, so that no funds could be appropriated for a project until after the authorizing committees had passed a resolution of approval. And apparently, the Executive conceded the validity of this response, and the effect was a legislative veto. I would submit that "a rose by any other name smells as sweet", and the ability of Congress to check agency action through its internal rulemaking under this bill is as effective as a legislative veto.

I would like to endorse what Congressman Levitas has said about the practicalities of this provision. In fact, this provision is more economical than the provision which currently exists in House rules for appropriation riders, because it is simply a parliamentary, legal matter for the Chair to rule on whether the point of order is sustained or not. It does not entail additional debate, additional voting, and additional amending process on the floor, and in this day and age, with the expansion of legislative sessions in time, it actually is more economical than the traditional appropriations rider that we became used to in the late seventies and early eighties.

So I think on both constitutional footing and on parliamentary footing, it is a sound and perfectly legal and legitimate device, and I think there should be no debate about that, although part of my testimony was designed to head some of that off. I am sure it will be debated, but I do not see any theory under which anyone could contest its constitutionality, given the way it is written.

Thank you.

[Statement follows:]

PREPARED STATEMENT OF STANLEY M. BRAND

MR. CHAIRMAN.

I want to express my appreciation for your invitation to appear and testify concerning S. 1145, The Rulemaking Procedure Reform Act of 1985. Although I am now in private practice following seven years as counsel to the House of Representatives, the subject of congressional review of agency action in the aftermath of the Supreme Court's legislative veto decision is one of intense interest to me. As I have stated in prior appearances before your committee, it is not every lawyer who loses a case in the Supreme Court and is invited back to address ways to remedy the outcome.

In focusing on the provisions of S. 1145, I would like to take a slightly different tack from that of Professor Gressman or Congressman Levitas, although I wholeheartedly endorse what they have said here today.

I would like to put a constitutional gloss on what I view as the single greatest innovation which would be wrought by S. 1145, if enacted, and that is the appropriation cut-off provision contained in section 807. As this provision is worded, it provides that when the Senate and House have adopted a joint resolution of disapproval it would be out of order under the rules of either House to appropriate funds which could be used for implementing the regulations.

Of course, following the Chadha decision, alternative mechanisms for providing congressional review of rulemaking were actively considered and high on that list was the Congress' power of the purse. See, e.g. Brand, Congress Has Post-'Chadha' Legislative Veto Options, Wash. Legal Times, December 5, 1985, at 12, col. 1, Levitas and Brand, Congressional Review of Executive and Agency Action: "The Son of Legislative Veto Lives On", 72 GEO.L.J. 801, 804 (1984). The appropriation cut-off provision could prove to be the sleeping giant, if you will, within S. 1145.

If we learned one lesson the hard way in litigating Chadha and its progeny, it was that we failed to fully appreciate the need to lay the foundation for our constitutional position early and creatively enough in the process. While the Attorneys General began to question the legislative veto and develop a theory to undermine its constitutionality, and circulate those views through various means, Congress ignored the need to fully develop and promote its own theory of constitutionality.

So, while it appears self-evident to us that the appropriations power is peculiarly within Congress' province, I believe we should take nothing for granted in the continuing war between the branches over the constitutional balance of power. Let's not forget that it was the Executive which originally requested the legislative veto to avoid having to obtain authority through the more cumbersome plenary legislative process, only to lauNch an all out assault later in its validity. This argues for expounding a bit on the appropriations-rule-making aspects of S. 1145 and what I take to be its constitutional underpinning.

We start with the appropriations powers, which is one of the many textually enumerated powers conferred on Congress. Congress has the authority "to pay the Debts and provide for the common defense and general welfare," U.S. Const., Art. I, Sec. 8, cl.1, "to make all laws necessary and proper for carrying into execution powers [assigned to the Congress]," _id_., at cl.18 and coupled with these powers, is the proviso that "[n]o money shall be drawn from the Treasury, but in consequence of appropriations made by law...." _Id_., Sec. 9, cl.7. As a direct corollary, _only_ Congress can levy or collect taxes. U.S. Const., art. I, sec. 8, cl.1. No power was more sensitive to the Framers than the power to tax the citizenry, and as Alexander Hamilton observed "[t]he power of taxation ... is the most important of the authorities proposed to be conferred upon the Union." _The Federalist No. 33_, at 245 (B. Wright ed. 1961). That power was reposed in the Congress because "[i]n imposing a tax, the legislature acts upon it constituents. This is in general a sufficient security against erroneous and abusive taxation," _McCulloch v. Maryland_, 17 U.S. (4 Wheat.) 316, 428 (1819) -- an evil against which the Framers sought to guard.

Even the courts have recognized that the coordinate branches are essentially at the mercy of Congress in this area. "No authority rests in the judiciary to appropriate funds, as a legislative body does, nor to exercise the power of veto as a bargaining device, as may the executive." In Re Juvenile Director, 552 P.2d 163, 166 (Wash. 1976). The complimentary power to tax and spend is a legislative prerogative par excellence, unique not just to the American constitution but to other democratic governments. Indeed, in England, the struggle for parliamentary supremacy took place largely over the purse strings of government, with the power of taxation secured by Parliament over the King, and with the power to levy direct taxes upon the King's subjects given to Parliament. B. Lyon, A Constitutional and Legal History of Medieval England, 548 (1960). Parliament too seized the right "to appropriate the money granted so that it would be expended on specific projects and not commandeered by the King, his councilors or his favorites for less important or frivolous purposes." Id., at 552.

In the American context, Professor Corwin stated it best when he described the appropriations power as "the most important single curb in the Constitution on Presidential power." Corwin, The Constitution and What It Means Today 101 (13th ed., 1975). See also, Goldwater v. Carter, 617 F.2d 697, 709 (D.C. Cir. 1979)(en banc), judgment vacated on other grounds, 444 U.S. 996 (1979)(mem.)(proper role of Congress in foreign affairs "includ[es] prominently its dominant status in the provision of funds...").

In addition to the basic power to determine whether to provide funds for a particular program or activity and the level of such funding, Harris v. McCrae, 448 U.S. 297, 317 n.19 (1979), Congress has broad discretion to determine the purpose of appropriations, as well as the terms and^R conditions under which they are made. E.g., Cincinnati Soap Co. v. United States, 301 U.S. 308 (1937); United States v. Price, 116 U.S. 43 (1885). There is little doubt that Congress' power over the federal purse is virtually limitless.

Turning next to its internal rule-making authority, U.S. Const., art. I, sec. 5, cl.2, the Court has stated that: "The Constitution empowers each house to determine its rules of proceedings. It may not by its rules ignore constitutional restraints or violate fundamental rights ... [b]ut within these limitations all matters of method are open to the determination of the House ..." United States v. Ballin, 114 U.S. 1, 5 (1892).

Indeed, the Chadha decision itself acknowledged the rule-making authority as an exception from the bicameral and presentment requirements for legislation.

> One might also include another "exception" to the rule that congressional action having the force of law be subject to the bicameral requirement and Presentment Clauses. Each house has the power to act alone in determining specified internal matters.

INS v. Chadha, 462 U.S. 919, 955-956 n.20 (1983).

The Court's reference to the Art. I, sec. 5, cl.2 rulemaking power as an instance in which "one House may act alone with the unreviewable force of law, not subject to the President's veto," id. 462 U.S. at 955, reaffirms the textual power of Congress to invoke the rule-making clause to bar consideration of appropriations measures.

As Ballin holds and Chadha reaffirms, while "this 'exception' only empowers Congress to bind itself," id., 462 U.S. at 956 n.20, that is all S. 1145 purports to do by making the appropriation subject to a point-of-order.

This mechanism does not run afoul of the Chadha test for legislation -- having "the purpose and effect of altering the legal rights, duties, and relations of persons" outside Congress, Chadha, 462 U.S. at 952, -- because it does not seek to alter the rights or duties of persons outside Congress. The full measure of its totally intramural compass is substantiated by the fact that once an appropriation or bill has passed, a point-of-order having been waived against it or not asserted, the point-of-order has no bearing on the validity of the enacted law. 57 Comp. Gen. 34 (1977); 34 Comp. Gen. 278 (1954); Metzenbaum v. FERC, 675 F.2d 1282 (D.C.Cir. 1982).

In tandem, then, the appropriation and rule-making power of Congress provides a constitutional means through which to check agency action. There would seem to be little doubt that Congress can deny itself, through its rule-making authority, the power to enact legislation and thereby deny to the Executive the ability to act. As the Court conceded in Chadha, 462 U.S. at 955 n.19, " ... Congress ultimately controls administrative agencies in the legislation that creates them ...," and where Congress has failed to legislate or appropriate, albeit because its own internal rules prevent it from doing so, there simply is no constitutional complaint.

Perhaps in a foreshadowing, a dispute arose during President Eisenhower's administration, over statutory provisions that required agencies to "come into agreement" with committees before implementing an administrative action, to which the Department of Justice objected on constitutional grounds. 41 Op. Att'y. Gen. 230 (1955). In response, Congress simply changed its internal procedures so that no funds could be appropriated for a project until after the authorizing committees had passed a resolution of approval. Apparently, the Executive conceded the validity of this response and the effect was a legislative veto. A rose by any other name smells as sweet and the ability of Congress to check abhorent agency action through its internal rule-making is as effective as a legislative veto.

What of the practical considerations of this device? Certainly practical concern propelled the increased use of the legislative veto in an era which witnessed the explosion of social and economic legislation of the late 1960's and early 1970's. Cooper & Hurley, The Legislative Veto: A Policy Analysis, 10 Cong. & The Presidency, 1, 3 (1983). The Court dismissed practical motivations and policy arguments as sufficient to overcome constitutional procedural requirements, Chadha, 462 U.S. at 945, but the already complex procedural rules of Congress require that consideration be given to the impact on its own workings which its response to Chadha will have.

I would only offer that the alternatives to the appropriation point-of-order mechanism of S. 1145 have significant drawbacks. The most pristine formulation, the appropriation limitation, or rider, was encumbered even before Chadha was decided, when the House changed its rules, making it more difficult to offer such amendments on the floor. H.R. Rule XXI, 2(c) and (d), Constitution, Jefferson's Manual and Rules of the House of Representatives, Sec. 384, H.R. Doc. 271, 97th Cong., 2d Sess. 548 (1983).

The point-of-order mechanism requires no additional debate or floor consideration or voting, so it is procedurally economical -- a primary advantage in this day of increasingly lengthy legislative sessions. Finally, points-of-order are less subject to partisan or political manipulation and are resolved by the presiding officer under time worn precedents.

In my view, the appropriation cut-off contained in S. 1145 represents both a constitutional and sound response to Chadha.

Senator **GRASSLEY**. Professor Gressman.

Professor **GRESSMAN**. Thank you, Senator.

I appreciate the opportunity to be here. I, too, fully support the constitutionality of all the provisions of S. 1145, including the appropriation procedures for cutting off funds for administering disapproved regulations.

I would also strongly endorse Stan Brand's suggestion that this is the time to establish through your committee reports and debates the constitutional basis upon which this legislation is being supported and hopefully will be forthcoming. I think one of the problems, as Stan mentioned, that we ran into in the litigation on the legislative veto was a total absence of constitutional justification expressed on the part of the Congress, which had enacted these various veto provisions. Those provisions were simply put into the various statutes for very practical and justifiable reasons. But little if any consideration was given in either the debates or in the legislative reports as to what power Congress was exercising when it initiated these various veto provisions.

As a very minor subsidiary to that proposition, I would suggest that the word "final" be eliminated from the various references in S. 1145 to "the recommended final rule" of a given administrative agency.

We found that in the veto litigation we ran into some difficulty with some courts viewing a provision in a statute that says that the administrative rule being promulgated and being vetoed was final. That meant, said some courts, that Congress was vetoing a "final" rule, according to the language of the statute. It really is not final—it was not meant to be final as a matter of law—and indeed, I think S. 1145 correctly identifies what is being reviewed in this situation, that is, a recommendation of the agency to the Congress.

I think that is an initial step that should be made to clarify exactly what it is that S. 1145 is submitting to this kind of legislative review. Congress is not reviewing a final rule. It is reviewing a recommended rule, a recommendation of the agency to the Congress.

But that aside, I think that, in supporting this proposed resolution as to this ongoing problem of reviewing and overseeing administrative regulations, one has to understand what we are trying to achieve—that is, what did the *Chadha* case really say about legislative review of administrative agency rules, and how is the Congress responding?

The point on that is that *Chadha* was not an administrative regulation veto situation. It was a highly unique problem in reviewing an adjudicative-type proposition involving a single illegal alien who was seeking to avoid being deported from this country, and was seeking a change in his legal status as an illegal alien.

There was no administrative regulation issued by the Attorney General or by the Immigration Service. That was not an issue in this case. It was an adjudicative kind of decision that, for unique reasons, was submitted to the Congress for review.

Now, deportation for an alien is a quite different Constitutional and legal kind of problem, and most of the debate before the Court in the *Chadha* case involved those unique characteristics. We expressly disavowed the propositions that were not an issue, that is, legislative review of administrative agency regulations. Those were the issues that were reserved and standing in the wings in the Federal Trade Commission case and the Federal Energy Commission case. The Court simply, and without batting an eyelash, summarily affirmed those two administrative regulation veto cases 2 weeks after the *Chadha* decision. Now, everybody assumes, therefore, that the rationale of the *Chadha* case necessarily covers all of the unique aspects of legislative review of administrative regulations, and that may well be. But the point is that we are confronted with a decision that was designed to address only the situation before the Court, and apply that to situations that were not truly before the Court. It is almost as if you have guidelines for putting a square peg into a square hole, but we are trying to apply those same guidelines to put a square peg into a round hole.

But even on its own basis, I suggest that the *Chadha* decision is truly unresponsive to many of the situations that confront an effort by Congress to review administrative rulemaking. Be that as it may, I think we have to understand that this rather chaotic and convoluted decision does not really appreciate what the constitutional basis is for what Congress has been trying to achieve all this time. All we have to go on from the Supreme Court is a simplistic statement that Congress can act legislatively, to affect the rights and liabilities and positions of persons outside the legislative branch, only through the bicameral-presentment processes. There is not a word of understanding by the Court that we are dealing with an entirely different legislative world than—or, rather at least, we are dealing with two kinds of worlds of legislative action. The first is the action whereby Congress enacts plenary statutes through the bicameral-presentment process.

But when we are dealing with administrative rules, we are dealing with the world of delegated authority, delegated by Congress, delegated power to agencies to issue quasi-legislative rules and laws. What you normally have, therefore, and what I suggest S. 1145 mirrors, are administrative rules and regulations that are left unreviewed and untouched by Congress; they become law without having gone through the bicameral-presentment process. That is the way administrative rules normally become law.

What has happened is that the Court said that if Congress wants to review or retain some part of that delegated function of lawmaking, it has to act in a bicameral fashion.

Now, this does not make a great deal of sense in the modern governmental world, but that is what we have to live with in light of *Chadha*. And so, given the *Chadha* ruling, and while this is not spelled out in any great detail in the *Chadha* opinion, I think we have to assume that to be constitutional, this kind of legislative review of a lawmaking rule of an agency must occur through use of the plenary powers of Congress in enacting legislation. Therefore a joint resolution of approval or disapproval being a form of legislative action that is subject to presentment to the President, has to be considered Constitutional.

In other words, what *Chadha* has forced upon Congress is to make some hard choices—that is, is Congress simply going to continue to delegate total unreviewable lawmaking functions to these agencies, or is Congress going to take on some of the burden itself by retaining some kind of a disapproval or approval function by means of planning legislation.

That is a very difficult choice. It is a major burden, a workload, placed upon this Congress. I understand, for example, that in a 2-year session of Congress, there are about 100 major rules enacted by various agencies, whereas there are about 10,000 nonmajor rules. At the same time, plenary legislation in a 2-year period amounts to about 400 to 500 laws, enacted during a session of Congress.

So, you do have a serious workload problem in establishing some form of bicameral-presentment review technique over these more than 10,000 administrative agency rules that are adopted over each 2-year period. I think it would be very helpful for us when challenges are made to the constitutionality of this kind of procedure, including the appropriations cutoff—and they are certain to be made by the executive at one time or another—if serious consideration were to be given by this committee stating in its report the power of Congress being involved to engage in these particular kinds of legislative review. That is helpful whether review is had through the appropriations route, the internal rules route, which is encased in the appropriations procedures, as well as the route of enacting a joint resolution of disapproval. I am sure such a statement can be drafted and that it would prove helpful.

I would commend the chairman and others who have sponsored this legislation, for suggesting a compromise method out of the morass into which *Chadha* has thrown the whole area of administrative delegated lawmaking functions. While I too would prefer a joint resolution of approval, rather than of disapproval, I can appreciate the practical and the political hurdles that may lie in the path of utilizing that technique.

Thank you.

Senator GRASSLEY. Thank you, Professor Gressman.

[Statement follows:]

PREPARED STATEMENT OF EUGENE GRESSMAN *

In my opinion, the congressional oversight procedures in S. 1145, as well as those proposed as amendments to the Federal Trade Commission Act, are fully consistent with the constitutional requirements for legislative action as defined by the Supreme Court in INS v. Chadha, 462 U.S. 919 (1983).

A. The Proposed Statutory Scheme

Any assessment of the constitutionality of the S. 1145 procedures must start with an understanding of the precise nature of those procedures. S. 1145 would create the Rulemaking Procedures Reform Act of 1985 as an addition (Chapter 8) to the Administrative Procedure Act, 5 U.S.C. Sec. 551, et seq. The essence of this proposal is the employment of the joint resolution mechanism to provide congressional oversight and possible disapproval of the lawmaking rules of federal agencies (as defined in 5 U.S.C. Sec. 551(1)) before they become final as a matter of law. The S. 1145 proposal applies to the lawmaking rules recommended by all such federal agencies, whereas the Federal Trade Commission Act amendments would apply only to the recommended lawmaking rules of the FTC. There is virtually no difference in the two sets of proposals. It is therefore appropriate to concentrate on the provisions of the S. 1145 proposal in summarizing the steps to be taken under both sets of proposals that lead to the use of the joint resolution form of congressional oversight. In summary fashion, those steps are:

(1) Any so-called "recommended final rule" of an agency must be transmitted to both the Senate and the House on the day the rule is sent to the Federal Register for publication. Sec. 803(b). [1]

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[1] I must object to the use of the word "final" in describing what is meant to be no more than "a recommendation of the agency to the Congress." It may be a "final recommendation," but it is not a "final rule" until the congressional processes have been completed. Use of the word "final" to describe the rule at the point of agency recommendation, in my experience, has served to confuse courts dealing with the nature of such congressional oversight mechanisms.

(2) Any such transmitted rule, despite the use of the word "final," "shall be considered a recommendation of the agency to the Congress and shall have no force and effect as a rule [of law] unless such rule has become effective in accordance with this chapter." Sec. 804(b).

(3) Agency rules subject to this procedure (including the FTC rules involved in the proposed amendments to the FTC Act) are those described in Sec. 551(4) of the present Administrative Procedure Act (APA) as having "general [rather than particular] applicability and future effect designed to implement, interpret, or prescribe law or policy." The proposed Sec. 802(2)(A) further emphasizes the lawmaking character of the rules affected by S. 1145 by specifically referring to a "rule or statement (that] has general applicability and substantially alters or creates rights or obligations of persons outside the agency." Thereby excluded from S. 1145 coverage are those rules described in Sec. 553(b)(A) as "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." Sec. 802(2)(B) further excludes rules "of particular applicability" such as those approving or prescribing future rates, wages, prices, services, and the like.

(4) A "recommended final rule" having general applicability becomes finally effective as a matter of law in accordance with the terms of the rule itself unless "a joint resolution [of disapproval] is enacted into law" within a prescribed period of time. In the case of a "major rule" as defined in Sec. 802(5), the joint resolution of disapproval must be enacted into law within 90 legislative days of the date the rule was received by the designated officers of the two Houses; in the case of a "nonmajor rule," the time limit is only 45 legislative days. Sec. 803(c)(1)(A) and (B). In other words, under S. 1145, a recommended rule becomes law automatically without any congressional action once the prescribed time period has elapsed without the enactment of disapproving legislation. This is quite similar to the "report and wait" procedure, long used in the promulgation of rules of procedure for the federal courts. See Chadha, 462 U.S. at 935 n.9.

(5) Carefully and expressly, S. 1145 eschews use of a joint resolution of approval as a technique of congressional oversight, under which a recommended rule would not become law unless affirmatively approved by enactment of a joint resolution in accordance with the bicameral-presentment processes. Thus Sec. 802(3) states that the term "joint resolution" for S. 1145 purposes "means only an unamendable joint resolution which contains no preamble" and which simply provides that "the Senate and the House of Representatives disapprove the recommended final rule" in question. That means that to express its approval of a recommended rule of general applicability, Congress need do nothing within the prescribed time periods (90 or 45 days); but to express its disapproval, Congress must use the bicameral-presentment processes during those periods to enact a statute that says "no."

(6) Finally, Sec. 807, entitled "Enforcement," provides in subsection (b) that upon the passage of a joint resolution of disapproval by both Houses -- regardless of what the President does upon presentment --

> "...it shall not be in order in the Senate or the House to vote on final passage of any bill or resolution making appropriations for the agency which issued such rule unless such bill or resolution contains provisions which prohibit the use of any funds appropriated by such bill or resolution to issue, promulgate, enforce, or otherwise carry out such rule."

In other words, even though a joint resolution agreed to by both Houses is not enacted into law, say by reason of a presidential veto, mere passage of the resolution by the two Houses gives rise to a point of order for any appropriations bill involving the relevant agency that does not bar use of government funds to implement the rule. Subsection (c) adds that for rules previously subject to a one-House veto, the passage of a joint resolution of disapproval by either House would give rise to such a point of order. Subsection (a) provides that the whole of Sec. 807 "is adopted as an exercise of the power of each House of Congress to determine the rules of its proceedings ... [and] that the provisions of this section are essential to the Congress in exercising its constitutional responsibility to monitor and review exercises by the Executive of delegated powers of a legislative character."

B. The Chadha Decision

In _Chadha_, the Supreme Court invalidated the procedure whereby one House alone could disapprove or "veto" an agency rule or action that had been transmitted to Congress for review before becoming effective and final as a matter of law. In the Court's view, any legislative disapproval of such "recommended" agency actions must take the form of a plenary statute, enacted into law pursuant to the traditional bicameral-presentment processes outlined in Article I, Section 7, Clauses 2 and 3.

The _Chadha_ decision, it must be emphasized, was concerned with precisely the kind of agency rules and regulations that is the concern of S. 1145 and the FTC proposals. Thus, when Congress was reviewing the Attorney General's action in recommending that Chadha's deportation status be changed, the one-House disapproval resolution was said to have had "the purpose and effect of altering the legal rights, duties, and relations of persons, including the Attorney General, Executive Branch officials and Chadha, all outside the Legislative Branch." 462 U.S. at 952. Likewise, when Congress reviews a rule recommended by the FTC or some other agency within the contemplation of S. 1145, it would be reviewing a rule that by definition "has general applicability and substantially alters or creates rights or obligations of persons outside the agency." Sec. 802(2)(A), as contained in S. 1145. It would seem to follow that when Congress enacts a joint resolution disapproving such an agency rule it is exercising legislative power that has, to repeat the words of _Chadha_, "the purpose and effect of altering the legal rights, duties, and relations of persons ... outside the Legislative Branch."

It is easy enough to conclude that the joint resolution mechanism, as embodied in S. 1145 and the FTC proposal, is consistent with the _Chadha_ requirement that congressional action affecting the rights of persons outside the Legislative Branch take the form of bicameral-presentment legislation. By long usage and congressional definition, a joint resolution "is a bill so far as the processes of the Congress in relation to it are concerned ... [and] are sent to the President for approval and have the full force of law." Constitution, Jefferson's Manual, Rules of the House of Representatives, H.R. Doc. No. 271, 97th Cong., 2d Sess., Sec. 397 (1983). And the Supreme Court has consistently treated joint resolutions presented to the President as acts of Congress for purposes of interpretation and application. Ann Arbor R. Co. v. United States, 281 U.S. 658, 666 (1930); Littlejohn & Co. v. United States, 270 U.S. 215, 226-27 (1926); and see New York v. United States, 331 U.S. 284, 298 (1947). Moreover, there appears to be no constitutional or legislative difference between a joint resolution of approval and a joint resolution of disapproval, at least insofar as having "the full force of law" is concerned.

But Congress should be aware of why Chadha has placed the Legislative Branch in the anomalous and awkward position of having to enact a plenary statute in order to say "no" to a recommendation of an administrative agency, acting within the scope of its delegated quasi-legislative authority. The answer lies in an understanding of some of the basic sea-changes that the Court wrought in the historic separation of legislative and executive powers and in the constitutional authority of Congress to delegate limited quasi-legislative powers to executive and administrative agencies. The Court has also hobbled the Congress in its ability to oversee the federal administrative world of regulations, a world created by Congress to help it meet the increasingly complex problems of government. To summarize the more important constitutional and governmental problems created by Chadha:

(1) Once a statute delegates quasi-legislative rulemaking power to an executive or administrative agency, and once an agency promulgates such a rule, Chadha holds that Congress lacks any constitutional power to disapprove the rule other than by enacting an entirely new statute. At the same time, by taking away such power from the Congress, Chadha gives the Executive constitutional power to promulgate and enforce such a rule unless its effectiveness is proscribed by a new statute. In

this context, it matters not whether the agency's rules is denominated a "recommended" or "proposed" rule. Nor does it matter that the original statute seeks to withhold from the agency final authority to determine when and if a lawmaking rule shall become effective.

(2) Chadha mandates that Congress follow the bicameral-presentment processes of Article I, Section 7 -- which were designed for the enactment of plenary legislation -- when it operates at the sub-level of quasi-legislative action that fills in the interstices of previously enacted legislation. In short, Congress must enact new legislation, pursuant to the traditional procedures, whenever it wants to stop the effectiveness of some delegated quasi-legislative rule.

(3) Chadha requires use of the bicameral-presentment processes even when Congress desires to say "no" to a proposed or recommended rule of law. But in no other instance where a bill is proposed must both Houses join in voting down the bill and then present the negative action to the President for approval or veto. Ordinarily, a bill before Congress has some affirmative characteristics; it declares some kind of a change in the legal rights or obligations of persons outside the Legislative Branch. And if but one House casts a negative vote on the bill, that is the end of the matter. Yet Chadha forecloses that common kind of one-House blockage of a Senate or House bill when the proposal is in the form of a recommended agency rule rather than a bill submitted by a Member.

(4) A related anomaly lies in the fact that, under the Chadha rationale, a lawmaking rule promulgated by an administrative agency can become an effective rule of law without going through the bicameral-presentment processes, whereas a lawmaking proposal introduced by a Member cannot become law except through use of those bicameral-presentment processes. At the same time, an agency's recommended rule usually becomes effective under the Chadha ruling without any action or vote having been taken by either House. That is impossible insofar as a measure introduced by a Member is concerned. In short, an agency rule becomes law through the silent acquiesence of Congress, or at least its

failure to adopt disapproving legislation, and seemingly even when Congress has not intended that result.[2]

(5) The Court has never suggested or implied that congressional inaction or silent acquiescence is an unconstitutional method of enacting an agency rule into law, at least when Congress expressly so provides. Indeed, in Sibbach v. Wilson, 312 U.S. 1 (1941), the Court expressly approved this method for bringing into legal effect the Federal Rules of Civil Procedure. The Sibbach case was approvingly referred to in footnote 9 of the Chadha opinion, 462 U.S. at 935. That "silent" method of enacting agency rules into law is one of the hallmarks of S. 1145 and, even under the bizarre rationale of Chadha, must be deemed consistent with the constitutional requirements for enacting agency rulemaking into law.

(6) In the final analysis, Chadha stands for the strange proposition that (a) agency rules may become law by congressional silence, but (b) Congress can stop such lawmaking-by-silence only by enacting some negative kind of bicameral-presentment legislation. S. 1145 accepts and perpetuates that bifurcated proposition by providing that an agency rule becomes law unless a joint resolution of disapproval is enacted into law within the prescribed periods. But nothing in the Constitution, as interpreted by Chadha, compels Congress to accept or follow this quixotic arrangement. It would be much simpler and more in accord with congressional intent if S. 1145 were to make the following provisions: (a) a proposed agency rule shall be nothing more than a recommendation and shall not become effective as a rule of law unless, (b) during the prescribed time periods, the Senate and the House pass a joint resolution of approval of the recommended rule, with presentation to the President.

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[2] Professor Tribe has written: "Both through rulemaking and through case-by-case dispositions, exercises of delegated authority change legal rights and privileges no less than do full-fledged laws. Unlike such laws, however, these actions need meet neither the bicamerality requirement nor the presentment requirement. Indeed, as Justice White stressed in his thoughtful dissent, we live in a sprawling administrative state in which 'legislative' power, in the exact sense employed by the Chadha majority, is routinely exercised by the federal executive branch, by the headless 'fourth branch of the government,' and even by private individuals and groups." Tribe, The Legislative Veto Decision: A Law by Any Other Name, 21 Harv.J.Legis. 1, 9-10 (1984).

(7) Under that scenario, the provisions of Sec. 807 respecting the appropriations for the agency that promulgated a rule disapproved by two Houses would be unnecessary. As presently written, Sec. 807 is probably constitutional, for Congress has virtually unlimited appropriation powers. See Harris v. McRae, 448 U.S. 297, 317 n.19 (1979). And when those appropriation powers are encased in the internal rules of the two Houses, as Sec. 807 prescribes, even Chadha concedes that the bicameral-presentment processes are inapplicable. 462 U.S. at 956 n.21. But when put in the context of the Chadha bifurcated model of "lawmaking-by-silence" and "disapproval-by-legislation," Sec. 807 appears to reflect congressional uncertainty and unhappiness with that model. Such uncertainty and unhappiness, justified though they may be, can be easily avoided by abandoning the Chadha bifurcated model and adopting the "joint resolution of approval of recommended agency rules" model.

CONCLUSION

The use of a joint resolution of approval of a recommended and non-final agency rule is quite faithful to the Chadha requirements for legislative action. Congress would be enacting a full-fledged law, with presentment to the President, to bring into being a recommended agency rule that in some manner changes "legal rights, duties, and relations of persons ... outside the Legislative Branch." 462 U.S. at 952. And, perhaps most importantly of all, a negative vote of either House on the joint resolution of approval would kill the proposed agency rule, just as a negative vote of either House precludes enactment of any bill proposed by a Member of either House. Thus there would be no need to supplement legislative review of agency action by use of the appropriations procedures outlined in Sec. 807 of S. 1145.

My conclusion is that the procedure that S. 1145 and the FTC Act amendments would establish follow the Chadha pattern of legislative oversight of administrative action, and therefore are constitutional. But it would greatly simplify these procedures and be more in accord with the intent of Congress in exercising such oversight if the mechanism for oversight be changed to a joint resolution of approval of a recommended agency rule.

Senator GRASSLEY. I have some questions that are directed toward specific individuals and then some toward the entire group. I would suggest, though, that if you are not asked a question and you have some pertinent additions that need to be made in support or in opposition to a particular point of a colleague of yours on the panel, feel free to do that.

I will start with Mr. Levitas. After *Chadha* you started adding language to appropriation bills as a matter of routine—could you give us some sort of review of objections, if any, that you ran into?

Mr. LEVITAS. Yes, Senator. After the *Chadha* decision, there were several approaches which we pursued, some of which were adopted in the House, and some by both Houses.

Senator GRASSLEY. So that would be those three that are referred to, that are in three separate pieces of legislation. Those were instigated by you, and eventually adopted by the Senate and become law.

Mr. LEVITAS. That is correct.

Senator GRASSLEY. Thank you. Please proceed.

Mr. LEVITAS. And one of the approaches is precisely the one that is contained in the legislation which you have introduced, which is utilizing the appropriations power of the Congress to say that Congress does not have to appropriate money for actions that Congress does not think ought to be funded. And that procedure was incorporated in an amendment which I offered and which was accepted.

Another approach that we were able to get passed in an amendment I offered in the House but the bill itself did not get through the Senate, was the procedure of a joint resolution of approval for major regulations. One example that I remember specifically was the Consumer Product Safety Commission where that language was put in as an amendment in the CSPC authorization, and was required that regulations rulemaking of the CSPC would require joint resolution of approval.

Just by way of supplementing that, I would offer the idea that in the case of the Federal Trade Commission for rulemaking under the Federal Trade Commission Act, that that would be an altogether appropriate course of action to follow. The FTC is an independent agency, and therefore no intrusion in the executive branch could even be argued. Also the power of the Federal Trade Commission to issue rules is almost commensurate with the commerce power of the Constitution itself. The appropriations limitation may not be sufficient, Senator, to get to those regulations and rules, because they may not require any affirmative implementation or enforcement action by the FTC, but would in fact create substantive rights in private individuals or corporations to litigate without any action requiring appropriation.

Senator GRASSLEY. I would like to now ask you, Mr. Levitas, to comment on a point that Mr. Eizenstat made. He raised some questions regarding the effectiveness and practicality of expedited procedures, and he suggested perhaps a sunset of those procedures. For the record, could you explain the importance of those procedures?

Mr. LEVITAS. Yes, I would be happy to. And if I may, just to recount a little bit of history, while Stu Eizenstat served as the Domestic Counsel to the President, I think we came within 2 millimeters of getting some congressional veto legislation passed at that time which would have avoided a lot of the controversy that we are now encountering and that you are having to deal with. And I think that Mr. Eizenstat's comments are very valuable for that reason.

But from the internal aspect of the Congress, the need for expedited procedures is absolutely essential, in my opinion, and particularly if you are dealing with resolutions of disapproval. Expedited procedures are an opportunity to assure that a floor vote can occur even if the jurisdictional committee objects.

In many instances, there is a symbiotic or even incestuoues relationship between a congressional committee and the agency over which it has jurisdiction, and in many instances, there is almost a paternalistic or proprietary attitude between the committee staff and that agency, to the extent that they are in bed together. And if you do not have expedited procedures, the committee staff or the chairman of the committee is in a position to simply block the Senate or the House from expressing its will on these types of disapproval resolutions. In the House you have the additional problem of the Rules Committee. The only assurance that you have got that there will be some opportunity to have this action taken, is to have the opportunity for these resolutions to be presented to the floor for action after a reasonable period of time and with appropriate constraints.

And I recognize the—and I commend you for making the distinction between the House action and the Senate action, because in the House, it would require, as I recall, one-fifth of the membership to sign a discharge petition in order to get that expedited consideration on the floor. But without that opportunity, the joint resolution of disapproval will do very little, in my opinion, except to give even more power to a very small group of people and put the catcher out in front of the batter, as it were, in that type of ballgame.

And let me just say one last thing, Senator—and I am not saying this impulsively, although it may sound that way.

One of the things that I find very troublesome about some of the opposition to your approach, both in the Senate and in the House, is that there seems to be an abdication by elected Members of the Congress to represent their constituencies when it comes to legislation by bureaucrats. And Professor Gressman made a very interesting observation—isn't it interesting that almost every unelected official in government and agency in government can legislate without presentment to the President or the Congress—except the Congress. The Congress has the power to legislate under article I, section I, and yet it alone is apparently precluded from effectively reviewing its delegated lawmaking unless it takes advantage of what you are offering.

And I just find it hard to understand why there are elected Members of Congress here who do not want to assume that responsibility. And I know what you are being subjected to, and therefore, I again commend you for doing this. But this is absolutely essential.

Senator **Grassley**. Professor Gressman.

Professor **Gressman**. Senator, if I might endorse something that Mr. Levitas just said, I think this is one of the areas where you have this basic confrontation between the executive and the legislative branches. That is, it has always been the executive's ultimate argument that once Congress delegates power to an administrative or executive agency or department, the executive has constitutional power to execute or implement that power as it sees fit, and Congress cannot step in and preserve any kind of review without enacting a new plenary statute.

Now, this is directly contrary to the whole concept of delegated authority. When Congress delegates to an administrative agency, Congress can put on such conditions and limitations as it sees fit. The Supreme Court has said that time and again. So, it all depends upon what the basic statute says. Are you going to give an administrative agency total, unreviewable power to promulgate regulations, or are you going to limit the delegation and tell the agency: "You can recommend, but you cannot put it into final effect as a matter of law until you have given Congress the chance to review that kind of quasi-legislative regulation." This is very basic to the whole concept of delegated authority, and I think it is right at this point that you have the longstanding power struggle between the executive and the Congress.

Senator **Grassley**. Taking up where Congressman Levitas left off, when the Department of Justice previously testified about whether or not an approach is workable, they relied on those worn-out refrains that you have heard so often, about increased legislative bureaucracy, the workload that we cannot handle, and the dangers of limited debate. I believe it was significant that the Department cannot and did not condemn the proposals on constitutional grounds as it has in past years. It has retreated back and resurrected the traditional objections to vetoes that are more apt to be used by people within the Congress than the constitutional arguments of past Departments of Justice. But in many instances, at least where there are existing vetoes in law, Congress has resolved those problems to our own satisfaction and has found the presence of vetoes very desirable. So, as far as reacting to Justice's comments, I would like to have you respond to that, particularly Mr. Brand and Mr. Eizenstat.

Mr. **Brand**. Well, the first thing I would say, Mr. Chairman, is beware of the Department of Justice when it says it wants to protect the Congress against itself. Their great argument in the *Chadha* briefs was that this decision had not been rendered fully, after perfect debate in the House, and I think that is just really a camouflage as you point out for their inability to say anything about its unconstitutionality.

The point was made earlier about objections that might be raised to the appropriation cutoff. One that I heard, and I am sure you will hear from your colleagues, if you have not already, is that it will channel more power to the appropriations side of the ledger in Congress. That was one that I heard when I went in front of the Foreign Affairs Committee after the *Chadha* decision and served up the appropriation limitation as one way of trying to limit the decision.

So, I would expect there will be an internal discussion about the effect of putting more eggs in the appropriation basket than in the authorization basket.

In terms of what to expect from the Department of Justice on that, I can only endorse what Professor Gressman said, and that is there may well come a time when they will move away from their inability to find any unconstitutionality, and in the proper case, might attempt to construct a theory that somehow, the Congress is interfering in authority delegated to an executive agency by seeking to prevent the implementation of that power through less than a plenary legislative process. And I think that is part of what Professor Gressman and I are trying to do, is lay the predicate for that.

Senator **Grassley**. Yes. Stu, before you respond to that, let me give you a more specific comment that Justice made that I would like to have you react to, and then maybe you could react to them both, but this is even more important than the previous question. They say—

> While the mechanism proposed in S. 1145 could be reworked to technically satisfy minimum constitutional requirements for legislation, we question whether such an approach comports with the traditional notions of legislative authority established by our Constitution through almost 200 years of constitutional history.

Mr. **Eizenstat**. I really disagree with that. And let me say, Mr. Chairman, that I really come at this from a frankly different perspective than the other three persons on this panel. I come at this from an executive perspective. We are all a product of our backgrounds, and that is my experience. I want the situation in which administrative agencies, independent agencies, executive branch agencies, and the President himself have as unfettered an opportunity to do what they must do as possible.

The reason that I have supported your bill so strongly is because I see it as a reasonable and constitutional and, frankly, unobtrusive way of accomplishing that comity and balance which is necessary under our Constitution.

It seems to me that it ill behooves us, or those of us with an executive branch perspective, who argued, as we did, that the legislative vetoes that were being enacted pre-*Chadha* were unconstitutional, to then come along now and make the argument that what you have done is somehow inappropriate. What has been done in your bill, both the appropriations provision and the report-and-wait provision, seem to me clearly constitutional. They are a reasonable balance—particularly the report-and-wait—between giving the executive branch sufficient discretion to act and yet leaving the legislative branch with some reasonable oversight which they are going to have. I would much rather deal with it through a comprehensive bill like you have done, rather than every statute on an ad hoc basis, leaving it to the courts in one case to sever certain provisions and the Congress, through each appropriations bill, to handle it. Your bill provides a much cleaner, much neater way. And I am frankly disappointed that the Justice Department is not taking a more affirmative view toward this so that we can get this issue behind us and do so in a way that I think is consonant with the Constitution, and frankly, consonant with permitting the executive branch to function in a reasonable way.

Senator **Grassley**. Along the same lines, Justice made the point that the enforcement mechanism contained in S. 1145 may be determined unconstitutional, and they base that on the fact that the appropriation bill may be passed prior to the President's consideration of the disapproval resolution.

Mr. **Eizenstat**. Well, I cannot see that as being a constitutional infirmity. For one thing, in each of the situations you set up, the joint resolution of disapproval and the appropriations provision, the President is presented with a bill that he can veto. So long as that is the case, it seems to me that it clearly meets the *Chadha* requirement.

If there is an internal rule, this point of order that you have, that is something that is purely internal. It is not presenting the President with a fait accompli; it is not presenting the President with a law that he cannot veto. It would be as if the Rules Committee in the House made a determination that something should be treated as a closed rule as opposed to an open rule. That is not something that presents the President with a constitutional challenge. It is something purely internal to the operations of the Congress.

So, I frankly do not see any constitutional infirmity. There may be administrative problems, there may be jurisdictional disputes between appropriations and other committes, but I certainly do not see how this possibly rises to a constitutional infirmity.

Senator **Grassley**. On my next question, I believe perhaps Congressman Levitas and Mr. Brand might be appropriate ones to answer, although again anyone may respond.

I would like to have you address yourselves to the same question I raised with Senator Boren and Senator Levin, that being the issue of a point of order on the appropriation bill.

In your opinion, would you agree that the point of order provision would indeed prevent the situation that the chairman of the Appropriations Committee fears most, a bogging down of the appropriations process through amendments, and how often do you think, realistically, we would even get to the point of using the appropriations process?

Mr. **Levitas**. Senator, I think the existence of the process itself, as I think Stu Eizenstat said, is probably the most effective means of reviewing these regulations, and I do not think you are going to see this formal process actually used very frequently.

Before the point of order could lie, you would have had to have a joint resolution passed through both Houses of the Congress on a particular regulatory action. If I had to guess, I do not suppose you would see that occur more than half a dozen times, 10 times, during a Congress. I think it is going to be worked out because the power exists far in advance of that process ever occurring. But in those instances where that does occur, it will be a far more efficient way of dealing with the problem, certainly in the House of Representatives, than the present procedure.

Under the present procedures, an appropriation amendment prohibiting the expenditure, the appropriation of funds to implement a particular regulation can be done, and is done, today. But what is required in the House—and at the risk of having everybody's eyes glaze over at this point—is you first have to defeat the motion for the committee to rise. After you defeat the motion for the committee to rise, you can then offer a limiting amendment which prohibits the use of funds for some particular purpose.

Now, those procedures are not only time consuming, but they are frequently disruptive of the appropriations process, and frequently, the chairmen of the Appropriations Committee or the subcommittees oppose those procedures not because they do not agree with the particular substance, but because they do not want to open the whole appropriations bill for further limitation amendments. Your procedure avoids those problems.

This procedure which you have devised, I think quite ingeniously, is one that will say that once the Congress has spoken, that is both Houses have adopted a disapproval resolution, and you simply deal with the funds cut-off by a point of order—very cleanly, very quickly. That approach, as Senators Levin and Boren have both confirmed, is a far, far better way of dealing with the matter than the existing appropriations amending process.

Mr. **Brand**. I would concur and say that really, I think they are arguing against their interests to have a system as you have envisioned where the threshold is very high, namely, a two-House resolution of disapproval, and instead have every member of the Senate be able to get up on the floor and offer an appropriations rider, seriatum, as we had in the House before we changed the rules. It is a far more cumbersome system, and a system that is assured of bogging down than one where you have established as a matter of internal procedure a very high threshold before the House and Senate can even consider such a point of order. And points of order are dispatched relatively painlessly and regularly, both the House and Senate, under very well-established and timeworn precedents that have been set forth for hundreds of years. So I really do not see that happening.

Senator **Grassley**. My last question is to Professor Gressman. You indicated that you preferred the joint resolution of approval, and I have explained why we are where we are today, because that is about the only way that we can get the job done in the spirit of congressional compromise.

Do you see any plausible constitutional problems with strictly the report-and-wait sections of S. 1145? You have heard some say, that a waiting period is in violation of *Chadha*, as it alters the rights, duties and obligations of those outside of Congress without the benefits of presentment to the President.

Professor **Gressman**. No, I do not think there can be any possible Constitutional problem with the "report and wait" technique. Indeed, the Supreme Court in *Chadha*, in a footnote—I think it is No. 9—approvingly referred to *Sibbach* v. *Wilson*, a 1941 decision, involving the constitutionality of the adoption of the Federal Rules of Civil Procedure, which is a perfect example of a report-and-wait provision. The rules are sent over to the Congress from the Supreme Court, where they lie over for a designated period of time, and if Congress does not enact some form of disapproving legislation, those rules become effective as a matter of law, enforceable in the Federal courts.

So I see nothing that S. 1145 does that raises any possible constitutional infirmity in view of the Supreme Court's own evaluation and reaffirmation of the constitutionality of the "report and wait" provisions.

Senator **Grassley**. Thank you.

I want to give one last opportunity—since we have such a distinguished panel, I do not want any of you leaving anything in midair. Go ahead, Mr. Levitas.

Mr. **Levitas**. Let me just say one last thing, Senator. I have read the statements of the other members of this panel and heard the other testimony, and I think your record is a rather complete one. And what I am about to say, I do not mean in a negative way. But I would not be—as I do not think you are—overly concerned about the reaction of the Justice Department opposing this legislation. We have heard that song before; it sometimes changes the tune slightly or a little difference in words, but there has never been an administration since the Hoover administration, which first requested the legislative veto, that has not in some form or other opposed it in general, except when it suited their purposes. For example, the Carter administration accepted the concept of legislative veto on legislative reorganization; in fact, they proposed it. I remember Attorney General Griffin Bell, explaining how many angels danced on the head of a pin one day, why it was a legitimate and valid procedure for legislative veto in reorganization, but was not for the FTC.

But be that as it may, the most interesting conversation I ever had on this subject with an administration had to do with our distinguished and beloved Vice President of the present administration. Trent Lott and I were in his office upstairs in the Capitol one day, talking about why the administration had decided not to support the legislative veto provision, in light of the support that candidate Reagan, the Republican platform, and the whole background that the administration that had just recently come into office had taken. And Vice President Bush said a very honest thing. He said, well, when we made those statements supporting the legislative veto, we were not in power at that time.

And I think that explains the position of the administration, and I would hope that you and your colleagues will take advantage of this opportunity to put in place a mechanism, comprehensive in nature, without the disruptive ongoing confrontation that has occurred, both before and after the *Chadha* decision. Let's get this behind us, and let's put it in place, not for the present EPA or the present FTC, but as a mechanism which will help make our Government work efficiently and responsively and accountably.

Thank you.

Senator **Grassley**. I agree. One final thank you very much. We appreciate your outstanding and expert testimony.

Thank you.

I would like now to introduce the members of our final panel. Sally Douglas is manager of Legislative Research for the National Federation of Independent Business. The NFIB has given their continued support regarding the legislative veto, and so we thank them for coming to testify once again. Also, Mr. Richard Leighton, who is appearing on behalf of the U.S. Chamber of Commerce. He is a partner of Buchanan Ingersoll in Washington, but is here today to testify on behalf of the chamber. He is chairman of the chamber's council on administrative law. This council is the originator of the administrative and regulatory policy proposals which are given to the chamber's board of directors for consideration. Thank you, too, Mr. Leighton.

I would like to have Ms. Douglas start and then go to you.

STATEMENT OF A PANEL INCLUDING: SALLY DOUGLAS, MANAGER OF LEGISLATIVE RESEARCH, NATIONAL FEDERATION OF INDEPENDENT BUSINESS, WASHINGTON, DC, AND RICHARD LEIGHTON, ESQ., CHAIRMAN, COUNCIL ON ADMINISTRATIVE LAW, U.S. CHAMBER OF COMMERCE, WASHINGTON, DC

Ms. DOUGLAS. Thank you, Mr. Chairman.

On behalf of our more than 500,000 members, who are small business owners across the country, I am pleased to be here once again to indicate to you our continuing support for legislative veto and to commend you and Senator Levin and the other cosponsors of S. 1145 for your persistence, your determination, and also for coming up with a very carefully crafted, well-drafted bill, which we believe will be workable.

As you know, to the small business owner, legislative veto is probably the simplest, most direct way in which the process of governing can work so there is accountability and responsiveness to the citizens who are being governed. That is probably the basis for our support, along with a very strong mandate vote in 1978, which has been reaffirmed on several occasions over the past few years. The members believe that legislative veto should be in place and that it can work.

I am at somewhat of a loss after listening to all the testimony today, because you have had a series of witnesses who are constitutional experts, who are lawyers, and they have provided, I think, along with Mr. Levitas, a very fine record for these hearings and for continuing to try and get legislative veto enacted.

I simply bring to you today very quick, brief comments of support from the small business community. We will work with you in any way we can to have the legislative veto enacted.

At that point, Mr. Chairman, I think I will just pass over to Mr. Leighton.

Senator GRASSLEY. Thank you.

[Statement follows:]

PREPARED STATEMENT OF SALLY L. DOUGLAS

Mr. Chairman, on behalf of our more than 500,000 small and independent business-owner members, NFIB is pleased to appear before you again to express our continuing support for legislative veto.

You, Senator Levin, and the co-sponsors of S.1145, the "Rulemaking Procedures Reform Act of 1985", are to be commended for your persistence and determination in trying to achieve enactment of a government-wide mechanism for legislative veto. Our support for Congressional review of regulations stems back to September, 1978, when our members voted 76% in favor of such a proposal. Small business support for legislative veto became evident again in 1980, embodied in Recommendation 41 of the White House Conference on Small Business, and again in 1982 as a recommendation from a task force on small business issues comprised of thirty associations. Finally, in June of 1984, at the Small Business National Issues Conference, sponsored by NFIB, Small Business United, the Chamber of Commerce, the National Small Business Association, and the American Institute of Certified Public Accountants, support for legislative veto was reaffirmed by the 110 small delegates to the conference.

As we have stated in previous testimony, small business owners believe that a tool such as legislative veto provides an avenue for appeal which does not now exist. Large corporations with their teams of lawyers, statisticians and computers are able to work directly with regulatory agencies or even go to court to challenge unfair or inequitable regulations. The small business owner cannot afford the time or the resources, being overburdened with work and frequently understaffed. A small business owner cannot afford the legal expertise of an administrative lawyer who would be able to protect him from devastating regulatory mistakes.

NFIB consistently has supported legislation advocating the reform of regulatory procedures to give Congress the power to reject any rule or regulation that goes beyond the original intent of the law. The establishment of a legislative veto mechanism provides a significant shift in the real power of government away from the bureaucracy and back to the elected Congress. Legislative veto makes it clear that, insofar as public policy and lawmaking are concerned, the agencies are the agents and creatures of Congress, not its masters or even its equals.

Too often in the past, agencies were given a free hand in determining what methods to use in implementing the laws passed by Congress. The NFIB believes very strongly that, just as Congress should not abrogate it legislative rights and responsibilities, neither should it dodge its responsibility to ensure that the intent of a law is carried out in the most effective and least burdensome manner possible.

With legislative veto, the small business owner could take his case directly to his senators or representative. Congress would be able to correct regulatory excesses and scrutinize both the regulating process in general and an agency's parameters in particular. Thus, small business considers such legislative veto proposals to be among the simplest and most direct methods of introducing accountability to the federal regulatory structures and enhancing Congressional responsiveness to the public's demands for sensible government.

Legislative veto would not be used, nor is it intended, as a means by which Congress could interfere in the legitimate business of the the Executive Branch. Congress is, after all, responsible for the making of our laws and should have the means whereby implementation of those laws can be reviewed to ensure that the intent of Congress is reflected accurately in rules and regulations. Legislative veto assures that the final responsibility and accountaility for actions taken under delegated authority rest with the elected representatives of the people.

Some have argued that legislative veto would be unnecessary if Congress were more precise in drafting laws in the first place. Yet even if Congress were to be particularly precise in telling agencies what regulations to write, there would remain the major challenge of ensuring that those regulations are written fairly and carefully. The Administrative Procedure Act (APA) has dictated agency practice for over three decades and has brought a modicum of consistency to the regulatory process. However, as the federal regulatory presence has become more pervasive, it is clear that APA protections are no longer adequate to ensure that the regulatory process works smoothly and carefully.

S.1145 is a carefully-crafted bill, delineating the procedures to be followed for review of regulations while making the necessary distinctions between House and Senate methods of operation. Similar to previous legislative veto bills, separate time periods are established for consideration of major and non-major rules. Procedures for discharge from committees are delineated, as are floor procedures.

Perhaps the only troubling aspect of S.1145 is the section regarding rules which are under review at the time of a sine die adjournment. The bill states that such rules will not become effective; they must be held over and resubmitted when the next Congress convenes. In most cases this provision would act as a valuable deterrent to agencies trying to circumvent the process by waiting until the last minute to submit rules for review. In other instances, the provision would work as an incentive for agencies to modify troublesome rules to ensure speedy consideration and approval by Congress. However, there may well occur the odd instance when Congress passes a major piece of legislation during the last hours of a Congress. It has not been uncommon, for example, for Congress to pass major tax bills at the last minute. While the notice and comment provisions of the Administrative Procedures Act provides an automatic 30-day time lag between a law's enactment and the proposing of a rule to implement the law, the sine die provision in S.1145 would delay the process even further. To reiterate, in most instances the delay would be preferable rather than deplorable. In some cases, however, it may work to the public's advantage to have timely review and implementation.

In summary, NFIB's support for legislative veto remains strong. We believe the authors of S 1145 have crafted a workable approach, and we are pleased to support the bill. Legislative veto remains a controversial concept, and prospects for enactment of a government-wide mechanism are dim. Even so, we in the small business community remain convinced that legislative veto would be a critical means of ensuring that Congressional intent is reflected in the rulemaking process. In an increasingly litigious society, legislative veto--if properly implemented--could well serve to decrease the burden on our court system by reducing or eliminating the need for court interpretations. Most certainly legislative veto would serve to mitigate the effects on small businesses and individuals of onerous regulations that subvert, pervert, or otherwise misinterpret Congressional purpose.

Senator GRASSLEY. Mr. Leighton.

Mr. LEIGHTON. Chairman Grassley, the Chamber of Commerce of the United States also would like to congratulate you and thank you for taking a leadership role in this issue and for protecting your own constitutional powers and responsibilities. We would also like to thank your very capable staff, including Ms. Milder.

We wish more people up here on the Hill would treat their delegated powers the way they treat their children. They should know where their offspring are at 2 a.m., and make sure that, if they are going to let somebody else mind them for a while, these babysitters should be forced to bring them up within the expected parameters.

You have read our statement. We are whole-heartedly in favor of S. 1145, and we stand ready to answer any questions you may have.

Senator GRASSLEY. I have one question I would like to have you comment on the importance of adding the FTC veto provision similar to S. 1145 to the FTC authorization bill as an item separate and apart from the passage of the Levin-Grassley legislation.

Mr. LEIGHTON. The chamber's position is that it is very important that the bill itself be passed, and if we could be assured that Chairman Miller would be there forever, we would say a veto provision probably would not be necessary. But given the extensive powers of the FTC and its track record, and the fact that Jim Miller is not going to live forever nor be there forever, we would endorse an amendment like that, assuming that—and we are assuming this, and we believe it to be true—such an amendment would not be fatal to the authorization bill itself.

Senator GRASSLEY. Sally.

Ms. DOUGLAS. I think, Mr. Chairman, it is also important to NFIB that the FTC legislative veto provision, or an FTC legislative veto provision, be reinstated. That has been the basis of our actions regarding the FTC bill in the last Congress. It will most likely be the basis again this time.

It is an important precedent. S. 1145 is a Government-wide veto, but it may take some time to get that enacted, and the FTC bill is up and running at this point. We do believe it is very important.

Senator **Grassley**. That is the only question I have. Thank you very much for your participation.

Mr. **Leighton**. Thank you, Senator.

Senator **Grassley**. And I would like to thank all the witnesses for appearing today. I believe that we have established a very positive record in support of S. 1145. Our first opportunity to pass this concept will be coming up shortly with the FTC authorization bill. This record, of course, will go a long way toward winning that battle.

Thank you all again. The record will remain open for 7 days to receive additional comment or answers to questions other committee members may wish to ask in writing.

The meeting is adjourned.

[Whereupon, at 4:45 p.m., the subcommittee was adjourned.]

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